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WATER RIGHTS

IN THE

WESTERN STATES

THE LAW OF PRIOR APPROPRIATION OF WATER AS APPLIED ALONE IN SOME JURISDICTIONS, AND AS, IN OTHERS, CONFINED TO THE PUBLIC DOMAIN, WITH THE COMMON LAW OF RIPARIAN RIGHTS FOR WATERS UPON PRIVATE LANDS. FEDERAL, CALIFORNIA AND OREGON STATUTES IN FULL, WITH DIGEST OF STATUTES OF ALASKA, ARIZONA, COLORADO, HAWAII, IDAHO, KANSAS, MONTANA, NEBRASKA, NEVADA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, OREGON, PHILIPPINE ISLANDS, SOUTH DAKOTA, TEXAS, UTAH, WASHINGTON AND WYOMING

FORMS

BY

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Of the San Francisco Bar

THIRD EDITION IN TWO VOLUMES

REVISED AND ENLARGED TO JUNE 1, 1911

VOLUME II

SAN FRANCISCO

BANCROFT-WHITNEY COMPANY

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SAN FRANCISCO

WATER RIGHTS

IN THE

WESTERN STATES.

PART V.

UNDERGROUND WATER.

CHAPTER 42.

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A. ENGLISH RULE.

(3d ed.)

§ 1039. The English Rule.—In 1843 the law of percolating water was first separately considered in the English case of Acton v. Blundell.[1] In this case it was said the question was one of equal novelty and importance. The law of watercourses had at that time been well settled, to wit, that the *corpus* of the water was not the subject of property while in its natural course, and that the only private right thereto was the purely usufructuary right to have the water flow so that it could be used, as we have already set forth at length.[2] But as to percolating water the court held that "*the case now under discussion does not fall within the rule which obtains as to surface streams, nor is it to be governed by analogy therewith.*" The movements of ground water were held too uncertain to base rights therein on the usufructuary principle of flow and use. Such water, instead of being in a class with the air, and not the subject of ownership, was considered "that it rather falls within the principle which gives to the owner of the soil all that lies beneath its surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or veinous earth, or part soil, part water." (The maxim, "*Cujus est solum, ejus est usque ad coelum et ad inferos.*") The *corpus* of the percolating water was held to be the subject of private ownership and real property as a part of the soil; whereas the *corpus* of running water is not part of the soil, nor property in any sense of the word.

Under this rule, which was adopted generally throughout the United States,[3] no rights whatever were recognized in the use of

1 12 Mees. & W. 324. For a few earlier but unimportant cases, see Cooper v. Barber, 3 Taunt. 99; Tenant v. Goldwin, 2 Ld. Raym. 1089, 92 Eng. Reprint, 222; Balston v. Bensted (1808), 1 Campb. 463; Hammond v. Hall (1840), 10 Sim. 552, 59 Eng. Reprint, 729. The American case of Greenleaf v. Francis (1836), 18 Pick. (Mass.) 177, had been decided before Acton v. Blundell, and had reached much the same result.

2 *Supra*, Part I. See, also, sec. 684 et seq.

3 The old rule is stated by Judge Temple in Katz v. Walkinshaw, speaking of decisions which assert and apply literally the maxim, "*Cujus est solum, ejus est usque ad inferos*," and that "water percolating in the ground,

diffused percolating water as a separate thing; it was regarded as a mere ingredient of the soil—one of the constituents of the soil—just as feldspar and mica are constituents of granite. The man who owned water-soaked soil had a right to do with it what he wanted, and he could dig out the soil, carrying the water with it, or he could leave the soil and take out only the water; and to look into any change resulting in the constituents of his neighbor's soil was deemed beyond the province of the law. So long as the percolating water stayed in the soil, the owner of the soil could take it, and take all that came there; likewise his neighbor, who could hence drain it all away. It was not recognized as a thing to which any definite value could be given.[4] This old rule of diffused underground water is somewhat like the law of diffused surface water, already mentioned;[5] both were too uncertain in their movements to found any right upon distinct from the land wherein or whereon they happened to lie.[6] Leaving out the exception of cases of malice below mentioned, this is also the civil-law rule.[7] The law in this respect was emphatically affirmed in the House of Lords in Chasemore v. Richards,[8] though Lord Wensleydale (Baron Parke) rendered an opinion inconsistent with the rule, and in the line of the

or held there in saturation, belongs to the landowner as completely as do the rocks, ground, and other material of which the land is composed, and therefore he may remove it or sell it or do what he pleases with it."

4 Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585.

5 *Supra*, sec. 34 et seq.

6 After referring, by way of argument, to diffused surface water cases, it was said: "These cases apply to the right to surface water not flowing in any defined natural watercourse. But, of course, the principles they establish are equally, if not more strongly, applicable to subterranean water of the same casual, undefined, and varying description." Chasemore v. Richards, 7 H. L. Cas. 349, 11 Eng. Reprint, 140, Lord Chelmsford. The modification in America of the law of percolating water below considered is also in some American jurisdictions adopted as to diffused surface water.

7 Droit Civile Francais, par Aubrey & Rau, vol. III, 4th ed., p. 34. In Acton v. Blundell it was said: "The Roman law forms no rule, binding in itself, upon the subjects of these realms; but in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusions at which we have arrived, if it proves to be supported by that law, the fruit of the researches of the most learned men, the collective wisdom of ages, and the groundwork of the municipal law of most of the countries in Europe." See, also, Maule, J., in Smith v. Kenrick, 7 Com. B. 552.

8 (1859) 7 H. L. Cas. 349, 11 Eng. Reprint, 140. See, also, New River Co. v. Johnson, 2 El. & El., Q. B., 434 (105 Eng. Com. L.); Regina v. Metropolitan Board of Works, 3 Best & S. 708, 9 Jur., N. S., 1008 (113 Eng. Com. L.); Hodgkinson v. Ennor, 4 Best & S. 229 (116 Eng. Com. L.). The main question in Chasemore v. Richards was whether a right in percolating water could be obtained by prescription, a point expressly left open in Acton v. Blundell, and it was held that it could not, expressly disapproving Balston v. Bensted, *supra*.

present American rule below considered. It remains the English rule to-day [9] and was generally followed in America.[10]

In one of the leading American cases following the rule, it was expressed as follows: "In the absence of express contract and of positive authorized legislation, as between proprietors of adjoining lands the law recognizes no correlative rights in respect to underground waters percolating, oozing, or filtrating through the earth, and this mainly from considerations of public policy: (a) Because the existence, origin, movement, and course of such waters, and the causes which govern and direct their movements, are so secret, occult, and concealed that an attempt to administer any set of legal rules in respect to them would be involved in helpless uncertainty, and would be, therefore, practically impossible; (b) Because any such recognition of correlative rights would interfere, to the material detriment of the commonwealth, with drainage, and agriculture, mining, the construction of highways and railroads, with sanitary regulations, building, and the general progress of improvement in works of embellishment and utility." [11]

(3d ed.)

§ 1040. Contrasted With the Common-law Rule of Watercourses.—The essential difference in the basis of this rule and that of watercourses is that the *corpus* of the percolating water is real property, while in the law of watercourses the *corpus* of the naturally running water is in a class with the air, and not property in any sense of the word.[12] "There is only one case in law

[9] There was a slight vacillation. In Grand Junction etc. Co. v. Shugar, L. R. 6 Ch. App. 483, it was held that any drawing away, by percolation, of water in a defined stream is wrongful. But in English v. Metropolitan etc. Co. (1907), 1 K. B. 601, this has been said to be restricted to "one in which there was direct tapping of an underground stream flowing in a defined channel, and not merely percolating water indirectly affecting the surface stream." Rather a case of withdrawing support than of taking the water. It distinguishes between "direct abstraction" and "withdrawal of support of subterranean water," saying that in the latter case no action lies.

[10] See California cases cited below. See, also, Boyce v. Cupper, 37 Or. 256, 61 Pac. 642; Crescent Min. Co. v. Silver etc. Co., 17 Utah, 444, 70 Am. St. Rep. 810, 54 Pac. 244; Herriman etc. Co. v. Kehl, 25 Utah, 96, 69 Pac. 719; Mosier v. Caldwell, 7 Nev. 363; Frasier v. Brown, 12 Ohio St. 294; Routh v. Driscoll, 20 Conn. 533, 52 Am. Dec. 352; Brown v. Illius, 25 Conn. 593; Ellis v. Duncan, 21 Barb. 230, 15 Morr. Min. Rep. 182; Wheatly v. Baugh, 25 Pa. 528, 64 Am. Dec. 721, 13 Morr. Min. Rep. 374; Haldeman v. Bruckhart, 45 Pa. 518, 84 Am. Dec. 511, 5 Morr. Min. Rep. 108; Chatfield v. Wilson, 28 Vt. 49; Clark v. Conroe, 38 Vt. 469. See, also, 64 Am. Dec. 727, note.

[11] Frazier v. Brown, 12 Ohio St. 294.

[12] *Supra*, c. 1.

in which water in its natural state is the subject of ownership, and that is the case of percolating water. A man is regarded as owning the percolating water while it is in his land. But other water in its natural state is subject only to the use of the man through whose land it flows. He has a right to its use, but is not regarded as having the title."[13] The word "land" does not include running water; but does, under this rule, include percolating water.

Likewise, under this rule, no permanent vested right can exist to the presence and continuance of a percolating or underground supply, of any kind.

B. THE AMERICAN RULE.

(3d ed.)

§ 1041. **The English Rule Modified.**—There is a steady trend of decision in America away from the English rule. In a list at the end of this chapter decisions are collected from seventeen American jurisdictions where it has been either expressly departed from, or doubted in one form or another.

The pioneer in this American departure was New Hampshire;[14] but until the same departure was made in the case of Forbell v. New York,[15] in New York State, it did not make much impression in the American law. After the Forbell case in New York, however, the English rule began to be departed from in America, until now the Forbell case may be said to represent the general American rule. Much reliance was placed upon the Forbell case in the California case of Katz v. Walkinshaw. We proceed to the recent California cases, which have set the lead for Western jurisdictions.

The matter is so new that, at the risk of some diffusion, the plan is adopted of first stating the California cases *seriatim*, and then attempting, tentatively, some classification of them.

(3d ed.)

§ 1042. **The California Cases.**—Up to the decision in Katz v. Walkinshaw,[16] the English rule had been generally accepted in California.[17] The case of Katz v. Walkinshaw was decided in

[13] Goodwin on Real Property, p. 2.

[14] Bassett v. Salisbury Mfg. Co., 43 N. H. 469; Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276.

[15] 164 N. Y. 522, 79 Am. St. Rep. 666, 58 N. E. 644, 51 L. R. A. 695.

[16] 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236.

[17] E. g., Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299; Cross v. Kitts.

November, 1903. Since then there have been numerous cases discussing or commenting upon the rule in that case in the California supreme court.[18]

Great uncertainty followed the decision in Katz v. Walkinshaw as to the rule actually laid down. For example, Geo. H. Maxwell testified in Kansas v. Colorado [19] that the decision was accepted as overruling Lux v. Haggin,[20] and the attorney general of the United States in his brief in that case said: "We have received information to the effect that, in the recent case of Newport v. Temescal Water Co., the supreme court of California has practically overruled the case of Katz v. Walkinshaw." We mention these not because they are correct (for they are not), but because they show the way the decision was received.

We proceed to a separate consideration of these cases.

(3d ed.)

§ 1043. Katz v. Walkinshaw.[21]—The facts of this case, appearing in the opinion of Mr. Justice Temple, were that there was an artesian belt of several square miles including plaintiff's land, and that water rose to the surface in wells on plaintiff's land for twenty years prior to the acts of defendants. Plaintiff's land was cultivated by the water and of great value, and depended entirely thereon. Defendants, by means of wells on another tract of land in the vicinity, took the water for sale to distant lands of

69 Cal. 217, 58 Am. Rep. 558, 10 Pac. 409; Gould v. Eaton, 111 Cal. 639, 52 Am. St. Rep. 201, 44 Pac. 319; Vineland v. Azusa etc. Co., 126 Cal. 486, 58 Pac. 1057, 46 L. R. A. 820.

[18] McClintock v. Hudson, 141 Cal. 275, 74 Pac. 849; Cohen v. La Canada etc. Co., 142 Cal. 437, 76 Pac. 47; Santa Barbara v. Gould, 143 Cal. 421, 77 Pac. 151; Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113; Newport v. Temescal Water Co., 149 Cal. 531, 87 Pac. 372, 6 L. R. A., N. S., 1098; Cohen v. La Canada L. & W. Co., 151 Cal. 680, 91 Pac. 584, 11 L. R. A., N. S., 752; Miller & Lux v. Madera etc. Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391; Burr v. Maclay R. Co., 154 Cal. 428, 98 Pac. 260; Same v. Same (pending); Barton v. Riverside W. Co., 155 Cal. 509, 101 Pac. 790, 23 L. R. A., N. S., 331; Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748; Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. 755; Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. 115, 27 L. R. A., N. S., 772. See, also, Verdugo W. Co. v. Verdugo, 152 Cal. 655, 93 Pac. 1021; Huffner v. Sawday, 153 Cal. 86, 94 Pac. 424; Pomona W. Co. v. San Antonio W. Co., 152 Cal. 618, 93 Pac. 881; Mentone Irr. Co. v. Redlands etc. Co., 155 Cal. 323, 100 Pac. 1082, 22 L. R. A., N. S., 382. In the district court of appeals, De Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. 1001; Ex parte Elam, 6 Cal. App. 233, 91 Pac. 811; Bonetti v. Ruiz (Cal. App.), 113 Pac. 118.

[19] 206 U. S. 46, 27 Sup. Ct. Rep. 655, 51 L. Ed. 956.

[20] Page 1167 of the testimony in Kansas v. Colorado.

[21] 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236.

others, causing the flow in plaintiff's wells to cease. There were other facts showing that there was no definite underground or surface watercourse involved, but that the water was broadly diffused, unconnected with any stream. The facts appear substantially the same in the opinion of Mr. Justice Shaw.[22]

The fact of twenty years' flow was not alluded to in the discussion in either opinion. An opinion was rendered by Mr. Justice Temple, affirmed on rehearing in an opinion by Mr. Justice Shaw.

The course of Mr. Justice Temple's opinion, in outline, is that the members of the community, in a case where the value of the land depends on the underground water, have a common interest in the water. Otherwise one for his own interest might destroy the community. Conditions in Southern California differ from places where the rule of absolute ownership is applied (not expressly taking the ground that the rule is not in force on that account). The doctrine contended for is not necessarily to enforce the rules of riparian rights on streams, though having similarities. The leading English and Eastern authorities are discussed, and shown either to expressly hold to the rule contended for, or else to contain much matter in support of it. The California cases have not hitherto directly involved the question. Substantial justice demands the rule contended for, and the judgment of the trial court in granting a nonsuit is reversed and a new trial ordered.

The course of Mr. Justice Shaw's opinion in outline states the objections to the new rule contended for; then, a rule of the common law which, owing to conditions in the State, is inapplicable and works injustice, was not adopted as part of the common law by statutes of 1850.[23] The history and conditions in Southern California are set forth at length, showing that the old rule of percolating water is inapplicable there and works increasing injustice. The previous California decisions are examined separately and either distinguished or shown to conflict. The difficul-

[22] Treating the case on the allegations in the complaint. "The complaint, in substance, states that the plaintiffs had wells upon their respective tracts of land, from which water flowed to the surface of the ground; that the water was necessary for domestic use and irrigation on the lands on which they were situate; that the defendant, by means of other wells and excavations upon another tract of land in the vicinity, prevented any water from flowing through the plaintiff's wells to their premises; and that this was done by drawing off the water through the wells of the defendant, taking it to a distant tract, and there using it."

[23] Page 219, chapter 95, now Pol. Code, 4468.

ties in the application of the new rule contended for are not insurmountable. Concluding, in view of the novelty of the new rule, some related principles not involved in the case, but which might be applicable to other cases, are given. The rule need not apply to oil wells. The doctrine expressed by Mr. Justice Temple is concurred in and the judgment of the trial court reversed and a new trial ordered.

Mr. Justice Angellotti delivered a short opinion concurring with the views expressed by Mr. Justice Temple, but refraining from expression upon other matters contained in the opinion of Mr. Justice Shaw not necessary to the decision, saying as to those matters that opinion cannot be considered as authority.

The different point of view taken in the opinions of Justices Temple and Shaw will appear more particularly in the following comparison of passages in the two opinions.

(3d ed.)

§ 1044. **The State of the Authorities.**—As viewed by Mr. Justice Temple, who examines chiefly the authorities outside of California, his contention is in accord with the best considered cases and opinions in all American jurisdictions. He is merely following the best authority, he declares. To quote:

"The doctrine of reasonable use has been recognized in many cases in the United States, impliedly in most, as I stated, but expressly in some. . . . . In a majority of the cases which are claimed as authority against the rule of reasonable use the court takes pains to note that the act which disturbs the percolating water was in using the land in the usual manner, and without the intent of injuring a neighbor. . . . . Whatever the English rule may be, the American cases either recognize the application of the rule of '*Sic utere tuo*' to the subject, or they are cases in which it was wholly unnecessary to consider that subject."[24] Of Chasemore v. Richards[25] he says that the dissenting opinion of Mr. Justice Coleridge in Exchequer Chambers presented the doctrine of reasonable use,[1] and when the case was taken to the House of Lords the view of reasonable use was fully presented; and though

[24] The same view of the authorities is taken in Pomeroy's Equitable Remedies and in the article by James Bar Ames, in 18 Harvard Law Review, 415, and other text-writers.

[25] 7 H. L. Cas. 349, 11 Eng. Reprint, 140.

[1] 2 Hurl. & N. 168.

the House sustained fully the *cujus est solum* doctrine without qualification, yet "Lord Wensleydale, however, who had doubts, pronounced an opinion *which seems to me in accord with the views I am trying to express.*"

The climatic conditions in Southern California, though touched upon, are not insisted on, and there is no statement that an admitted rule of the common law is departed from on that account. He does not take the stand that he is laying down a new rule. The only thing new, if anything, is the modification in application of the rule, a modification found, he says, in the best considered cases and opinions in all jurisdictions, so that he is merely following the best authority everywhere, he declares. "It does not require a reversal of the rule laid down in Acton v. Blundell, which has been so often cited and indorsed, but only a holding that in certain cases there should be added the element of reasonable use, having reference both to the land belonging to the party who has disturbed the movement of percolating water and to adjoining land, and to land sensibly affected by such acts."

(3d ed.)

§ **1045.** On the other hand, Mr. Justice Shaw, discussing chiefly the California decision, says: "The decisions have not been harmonious, and in many of them what is said on this subject is mere *dictum.* A brief review of the cases will demonstrate this to be true."[2] And concludes: "In view of this conflicting and uncertain condition of the authorities, it cannot be successfully claimed that the doctrine of absolute ownership is well established in this State," though admitting that in all these cases, even those distinguished as to actual decision, it appeared consistently as *dictum.* The justice takes the ground that the old rule is entirely abrogated, and was never a part of our common law at all; the ground that "imperative necessity, unknown to the countries which gave it birth,"[3] demands a new rule in abrogation of the common law.

"The idea that the doctrine contended for by the defendant is a part of the common law adopted by our statute, and beyond the power of the court to change or modify, is founded upon a misconception of the extent to which the common law is adopted by such statutory provisions, and a failure to observe some of the rules

2 But in the later case of Barton v. Riverside Co., 155 Cal. 509, 101 Pac. 790, 23 L. R. A., N. S., 331, the justice says that the older cases are overruled.

3 We quote from page 188, *supra.*

and principles of the common law itself. . . . . The water itself, owing to the tremendous need, the valuable results from its application, and the constant effort to plant more orchards and vineyards to share in the great profits realized therefrom, has become very valuable. In some instances it has been known to sell at the rate of $50,000 for a stream flowing at the rate of one cubic foot per second. . . . . An ordinary difference in the conditions would scarcely justify the refusal to adopt a rule of the common law or one which has been so generally supposed to exist; but where the differences are so radical as in this case, and would tend to cause so great a subversion of justice, a different rule is imperative."

To conclude, Mr. Justice Temple merely modified the application of the old rule. Mr. Justice Shaw considers it abrogated and an entirely new one substituted.

(3d ed.)

§ 1046. **The Rule Contended for.**—The rule contended for by Mr. Justice Temple is this: The rule of Acton v. Blundell remains as the substructure. The landowner may do what he will with his percolating water (but with this modification) so long as, *if he damages the land of another,* he does it in the reasonable use of his own land. The principle Mr. Justice Temple contends for is shown by the following passages: "He may cultivate his land, and for that purpose ordinarily may drain it, and plow it or clear it from forests, although all these operations may affect the flow of water to the lower proprietor, both in the watercourse and by percolation. . . . . The peculiar nature of the property which enables one to take it by drainage does not justify the taking, save in the usual and reasonable use of his own land—in other words, for the proper use and betterment of his own property."

He is, then, recognizing the old rule as in force so long as complainant's use of his land is not interfered with, or if the purpose of taking is for the reasonable use of the land on which taken. It is not an ignoring of the old rule, to replace it with the rules governing watercourses, though, he says, there are analogous results in some ways, as to which he says: "And it seems to me a great mistake is made in supposing that, if the plenary property of a landowner in percolating water is denied, the alternative is to apply to such water all the rules which apply to the use of water flowing in watercourses having defined channels."

(3d ed.)

§ **1047. Same.**—Justice Shaw concludes his opinion, "with regard to the doctrine of reasonable use of percolating waters, we adhere to the views expressed in the former opinion." The most general form in which it appears in the opinion of Mr. Justice Shaw is as follows: "It limits the right of others to such amount of water as may be necessary for some useful purpose in connection with the land for which it is taken. If, as is claimed in the argument, such water-bearing land is generally worthless except for the water which it contains, then the quantity that could be used on the land would be nominal, and injunctions could not be obtained, or substantial damages awarded, against those who carry it to distant lands."

He then contends that the common law is entirely abrogated because unsuited to conditions, and, more particularly, says: Where neither party seeks use on his own land, but both for distant lands, the law of appropriation as it arose on the public lands in the early days, and the law of prescriptive titles, shall apply in a general way (not adverting to the generally accepted form of expression that the law of appropriation under the California doctrine applies only to public lands).[4] Where one party is seeking use on his own land and another on distant lands, priority in time of use by the one seeking use on his own land will give him the paramount right, though only to the quantity necessary for his use, the other (called the appropriator) taking the surplus; whereas it is considered best not to state a positive rule concerning priority in time of use by the one seeking use on distant land. Where two parties both seek use on their own land, they shall share it between them in fair and just proportion, unless, possibly, priority of time of use shall have some hearing here, too. As to questions of procedure, preliminary injunctions should in any case be granted only as a last resort. Standing by during great expenditure to prepare works for public use should bar an injunction where injury was to have been anticipated from such works. Nonuse also should bar an injunction, though not, perhaps, a decree settling complainant's right to use the percolating water when necessary. In stating these principles, the learned justice says: "In view of the novelty of the doctrine and the scope of argument, it is not out of place to indicate to some extent how it should be done, although other-

[4] *Supra*, secs. 221, 227, etc.

wise it would not be necessary to the decision of the case." Concerning them Mr. Justice Angellotti said: "I concur in the judgment and in the views expressed in the opinion of Mr. Justice Temple on the former decision of this case as to the application of the doctrine of reasonable use to percolating waters. When properly applied, it appears clear to me that such doctrine will serve to protect the rights of the owner of realty rather than impair them. I also concur generally in the views expressed by Mr. Justice Shaw in the majority opinion as to the same subject matter, but several important questions are discussed that are not necessary to a decision of this case, and as to which the opinion herein cannot hereafter be considered as authority. As to such matters I refrain from expressing any opinion."

The principle contended for by Mr. Justice Shaw is thus in a general way that the common-law rule of percolating waters is entirely abrogated, and an independent system combining the rules of both appropriation and riparian rights (but chiefly prior appropriation) regarding watercourses, substituted. But in that regard it is not clear how to reconcile with the rule of Lux v. Haggin the statement that priority in time of distant (or nonriparian) use may give precedence over local use, since Lux v. Haggin so firmly, as to surface streams, made priority of riparian land title the test and confined appropriation, as a system, to the public domain;[5] likewise with regard to priority in time of use being of any importance with regard to local (or riparian) use between two neighboring proprietors;[6] likewise as to the statement that the common law may be abrogated *in toto*, since Lux v. Haggin held that to do so with regard to watercourses would, as to private lands, confiscate the landowner's property, and as to public lands, would interfere with the primary disposal thereof.

We proceed to a consideration of the more recent cases before trying to deduce some statement of the result of Katz v. Walkinshaw, and some statement of the new rule. The later cases seem to be a development of, and to settle the law in accordance with, the reasoning and principles contained in the opinion of Mr. Justice Temple, and to definitely lay aside the law of exclusive rights by priority of appropriation.

[5] See *supra*, sec. 815 et seq.

[6] See *supra*, sec. 739.

C. SUCCEEDING CALIFORNIA CASES.

(3d ed.)

§ 1048. McClintock v. Hudson.[7]—The waters gathered in a tunnel were not directly flowing in any watercourse, but were percolations shown to be tributary to a stream and in a material degree supplying its flow. Plaintiff's tunnel was on his own land. Defendants were riparian proprietors on San Jose Creek, and made their claims as such. (Plaintiff was also.) Plaintiff used the water on distant lands.

"The excavation commences in the bed of the stream and about at the level thereof, and for a distance of about four hundred feet it runs almost parallel with the stream at a distance of not more than fifty feet away, and at an elevation at the upper end of the four hundred feet, about two feet below the bottom of the stream bed," and the tunnel follows this course. The tunnel caused the stream to cease flowing on the surface. The case of Katz v. Walkinshaw governs if the tunnel diminished substantially the waters flowing in the stream, it is held. "By the principles laid down in that case it is not lawful for one owning land bordering upon or adjacent to a stream, to make an excavation in his land in order to intercept and obtain the percolating water, and apply such water to any use other than its reasonable use upon the land from which it is taken, if he thereby diminishes the stream and causes damage to parties having rights in the water there flowing." If, therefore, the stream was substantially diminished to injury of defendants, it is wrongful, "even if the water when taken did not constitute strictly a part of the stream" but was tributary to it, on its way to the stream. This, says Mr. Jusice Shaw, would not be the rule but for Katz v. Walkinshaw. They were at least waters which would have eventually reached the stream. "His [the tunnel owner's] rights therein are no greater than they would be if he had taken the water directly from the stream." The tunnel owner's right is limited to what he could do as riparian owner on the stream; viz., take a reasonable quantity (in this manner, allowable, however, *semble*) for the proper use (without waste) on the riparian land where the tunnel was built.

Two points are to be noted in this case; first, that it dealt with percolations tributary to a stream, not with diffused percolating water unconnected with a stream; and second, that the complain-

7 141 Cal. 275, 74 Pac. 849, Shaw, J.

ing party suffered damage to the use of his land as riparian to the stream, while the party complained of was not seeking use on his own land.

(3d ed.)

§ 1049. **Cohen v. La Canada W. Co.**[8]—A small watercourse on plaintiff's land, which was cultivated, was fed by springs, most of which were a little above the upper line of plaintiff's land. In 1891, while this upper land was vacant public land, plaintiff's predecessors, by pipes, etc., carried the water of the springs to plaintiff's land for use. Plaintiff was thus both an appropriator and a riparian proprietor on the watercourse. In 1898–99, the upper land now having passed into private hands, defendants, with consent of the upper owner, dug tunnels near and under the springs, entirely drying up some of them, and greatly diminishing the flow of others, taking the water away to nonriparian lands for sale.

After saying that the old rule that "underground water not in the form of a subterranean 'stream,' but merely 'percolating,' was a part of the soil, and could be removed by the owner of the land at his pleasure, without consideration of the adjoining proprietors," would have allowed the acts here in absence of evidence of a definite underground stream feeding the springs, Mr. Justice McFarland says it has been definitely settled by Katz v. Walkinshaw and subsequent cases that the underground conditions (whether subterranean stream or reservoir or otherwise) need not be proved, so long as there is proved an actual deprivation of water to which others have a right. "In such an action it is sufficient for the plaintiff to show that wrongful acts of the defendant complained of did actually deprive plaintiff of water to the use of which he was legally entitled, and if these acts consisted of subsurface excavations, it is not necessary for the plaintiff to show that a well-defined subterranean stream has been intercepted, *or to show the particular subterranean conditions which were disturbed*, provided it clearly appears that the acts of the defendant caused the destruction or diminution. And it has been established by these cases that the right of an owner of land to use water percolating therein is a right only to a reasonable use thereof for the benefit and enjoyment of his land, and subject to the maxim, '*Sic utere*,' etc.,

[8] 142 Cal. 437, 76 Pac. 47, McFarland, J. (First appeal. See, also, second appeal, sec. 1052, *infra*.)

and does not include the right, by excavations, to diminish the flow of water to others where the diversion is not for a reasonable use on his own land." Findings, it is held, must be made of the extent to which the tunnels diminished the flow of the springs.

Formerly it had been decided exactly *contra;* the appropriator could follow the water to the very mouth of the spring,[9] but not farther.[10]

The court says that the case is very similar to McClintock v. Hudson, and it is to be noted that both dealt with percolations tributary to a surface supply (a spring in this case), not with diffused percolating water having no connection with any definite body of water. Further, the complaining party here also was damaged in respect to his land as riparian to the spring, while the party complained of was not seeking use on his own land.

(3d ed.)

§ 1050. Montecito etc. Co. v. Santa Barbara.[11] — Plaintiff claimed a branch of Montecito Creek for use on nonriparian lands. (Sale for town use.) Defendants drove tunnels on their own land near the creek above the bed of the creek but following its line, and inclined so as soon to pass beneath its level. In brief, "the tunnels were driven to one side of the creek, parallel with it, and below its level." Mr. Justice Henshaw says: "First, it should be noted as applicable to all of these appeals that this case is radically different from that of Katz v. Walkinshaw.[12] Here no question arises as to the use or the right of use, or the apportionment of seepage or percolating waters by and between the owners of the overlying lands. Here the waters flow or are developed in a barren and mountainous country, are of no use upon the lands within the watershed where they are found, but are of great value to the neighboring towns, cities and fertile valleys. Each one of the parties to this action is carrying the water to alien soil, and no claimants—not even those who are riparian proprietors—pretend to use the water upon the lands from which it is obtained. In Katz v. Walkin-

9 Ely v. Ferguson, 91 Cal. 187, 27 Pac. 587.

10 Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299; Huston v. Leach, 53 Cal. 262; Southern Pac. Ry. v. Dufour, 95 Cal. 615, 30 Pac. 783, 19 L. R. A. 92.

11 144 Cal. 578, 77 Pac. 1113, Henshaw, J.; S. C., 151 Cal. 377, 90 Pac. 935, did not discuss this matter.

12 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236.

shaw the condition presented was that of a well-defined underground catchment basin, a subterranean lake, so to speak, loosely filled with gravels. The lands above this subterranean basin were valuable because of the waters beneath, and such of the water as was taken from this basin and used upon its superior lands found its way back to the source of supply as surely as does such water when used by a riparian proprietor of a flowing stream within its watershed. In Katz v. Walkinshaw, the controversy arose between the owners of such superior lands upon the one hand and a defendant water company upon the other, which, tapping the subterranean basin, was draining its water for use upon lands without the limits of the basin, which use, if continued, threatened the impairment and destruction of all the overlying lands. The main question which this court was called upon to consider, and did consider and decide, was whether the common-law doctrine of absolute ownership in percolating water, the *cujus est solum* doctrine, was or was not, under the peculiar conditions existing in this State, subject to just limitation under the doctrine of *sic utero tuo*, and this court, recognizing the inevitable injury that must be worked to private interests whichever rule should be held to apply, after much deliberation decided that however differently the rule might be declared in States and countries well and regularly supplied by rainfalls, in this State, with its great arid stretches, its seasons of drought and its irregular meteoric water supply, percolating waters, *when circumstances of hardship or injury should be presented in some particular case*, must be held under the rule and doctrine of *sic utere.*"

The tunnels intercepted the oncoming seepage, practically forming new channels for the stream. . The doctrine of "subflow" is again set forth, as involved in the case. The Eaton tunnel's right was upheld on the ground of prescription. The city's tunnel was declared wrongful so far as it diverted water from plaintiff (a very small amount), leaving the determination of the amount to a new trial, with an observation that no injunction should issue if the restoration of that amount to plaintiff can be accomplished. The plaintiff's rights to the stream by condemnation and prescription with the above exceptions were upheld.

In this case it is to be noted that again the water was connected with a stream either as its subflow or as percolations tributary to it. Also, that the complaining party suffered damage, while the

parties complained of were not seeking use on their own land; but the damage to plaintiff was not in the use of his own land either, because both parties were seeking to carry the water to distant lands.

(3d ed.)

§ 1051. Newport v. Temescal Water Co.[13]—The water in this case was unconnected with any stream, either as subflow or as tributary—there was no definite stream of any kind in the neighborhood. Instead, the condition presented was of a definite catchment basin filled with water-bearing gravels, and hence closely like the situation in Katz v. Walkinshaw, and the first case since that one which dealt purely with diffused percolating water uncomplicated by rights in any stream or spring. The catchment basin involved part of the lands, but the trial court found that there was no single basin involving all of them. Mr. Justice Henshaw said: "To follow and answer plaintiffs' argument would amount to no more than a setting forth of the evidence which does sustain the findings, and to do this fairly would fill a volume of our reports." And adds that a naked statement of the evidence on a single point shows the technical nature of the testimony, and this testimony, to show that there was a subterranean connecting between the pumping works and plaintiff's land, failed, in the end, to show it as to a substantial part of the land. The land was all so impregnated with alkali as to be unfit for agriculture, little benefited by irrigation. The water level had, in three years, been lowered (only ten feet), but the court distinctly repudiated this "*post hoc ergo propter hoc*" argument, there being evidence that periods of drought and pumping by strangers and as well by plaintiffs themselves were the substantial causes, and the pumping by defendant only cumulative, and reasonable rainfall would raise the water level to its former plane. The damage inflicted upon plaintiff's land was insignificant. The court says: "These findings so completely dispose of the controversy upon its merits that little is left to be said," and adds: "The decision of Katz v. Walkinshaw is adhered to, but as plaintiffs on the facts failed to establish any ground for relief under the principles there laid down, no amplification of those principles becomes necessary." Adds that a temporary injunction until payment of damages (which were insignificant) might have

[13] 149 Cal. 531, 87 Pac. 372, 6 L. R. A., N. S., 1098, Henshaw, J.

been granted, but that such was not the form of the suit. On petition for rehearing (denied), Beatty, C. J., thought there was a cogent argument that should be heard based on the contention that the acts were the same as were enjoined in Katz v. Walkinshaw.

The controlling facts seem to be, from the above, that as to part of plaintiff's land, there was no subterranean connection with that of defendants, and as to the rest, it was unfit for cultivation, and defendants' acts were not such as to have done substantial or permanent injury, even if it were fit for cultivation. This seems to be the reason why the case was not within Katz v. Walkinshaw. That is, plaintiff failed to show that there was, or could be, any damage to the use of his land.

The points to be noted are that the case dealt purely with diffused percolating water, no stream of any kind being involved; that the complaining party was not and could not be damaged in the use of his own land, and that the party complained of was taking the water for sale on distant lands.

(3d ed.)

§ 1052. Cohen v. La Canada Water Co.[14]—It was said that if the percolating water fed a stream, the stream claimant (being both a public land appropriator and a riparian owner) could enjoin the tunnel owner;[15] but it was held that the proof did not establish the connection with a stream. The lands constituting the place of use were "not *riparian*[16] and do not abut or adjoin the lands upon which said tunnels are situated." It was claimed that such use is *per se* unlawful. Mr. Justice Lorigan said: "In support of her position the broad proposition is contended for that percolating waters can never be taken away from the land where they exist, although adjoining proprietors are not injured or damaged thereby, and it is asserted this rule finds support in the decisions of this court in Katz v. Walkinshaw and McClintock v. Hudson,[17] in Southern Cal. I. Co. v. Wilshire and Montecito Valley Co. v. Santa Barbara,[18] and in Gutierrez v. Wege.[19]

[14] 151 Cal. 680, 91 Pac. 584, 11 L. R. A., N. S., 752, Lorigan, J. (Second appeal. See, also, first appeal, sec. 1049, *supra*.)

[15] As *infra*, sec. 1082, percolating tributaries.

[16] Note the use of the word "riparian."

[17] 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236; and 141 Cal. 275, 74 Pac. 849.

[18] 144 Cal. 68, 77 Pac. 767, and 144 Cal. 578, 77 Pac. 1113.

[19] 145 Cal. 730, 79 Pac. 449. The Wilshire and Gutierrez cases did not involve underground rights, but were

But these cases do not lay down the doctrine as broadly as appellant contends for. They lay down the rule that waters of a stream, or percolating waters, cannot be taken away from the lands on which they flow or from lands upon which they are found, for use elsewhere, where the result of such taking would be to injuriously affect adjoining property owners. The principle which enters into this rule is the protection to be given the superior natural rights of adjoining property owners to the flow and use of such waters. *Where, however, there can be no injury worked to such adjoining owners by the taking and use elsewhere of such waters, no limitations should be placed upon the right of one developing them as to their use.*"[20] And held that such developed water could be taken to any lands the defendants saw fit. "For authority sustaining this proposition we cite Hansen v. McCue,[21] Gould v. Eaton,[22] and Montecito etc. Co. v. Santa Barbara."[23]

The language of this case, and some of the citations apply the rule of riparian rights to percolating water; some of the citations show that the older cases are not regarded as overruled. The actual decision is upon the ground that plaintiff showed no damage in respect to his land, nor any possibility thereof.[24]

The points to be noted are that the water was percolating, diffused, having no connection with any stream as subflow or tributary, and hence the facts are like Katz v. Walkinshaw, with the exception that no definite underground catchment basin of water-bearing gravels existed. The complaining party was not, and could not be, damaged in the use of her own land, and the party complained of was taking the water to distant land.

(3d ed.)

§ 1053. **Burr v. Maclay R. Co.**[25]—Both parties obtained their land from a common grantor who had sunk seven wells and was

cases of riparian rights on surface streams.

20 Italics ours.

21 42 Cal. 306, 10 Am. Rep. 299.

22 111 Cal. 639, 52 Am. St. Rep. 201, 44 Pac. 319.

23 144 Cal. 585, 77 Pac. 1113.

The tunnel of defendant was partly (eighty feet) in plaintiff's land. It was held that this gave plaintiff the right to whatever water she proved to enter the tunnel in those eighty feet, but no more.

24 There would be much conflict whether the absence of damage would be material in regard to riparian rights. *Supra*, sec. 814 et seq.

25 (1908) 154 Cal. 428, 98 Pac. 260, Shaw, J. An order was entered February 17, 1908, in this case as follows: "By the Court: It appears that the

taking thirty inches of water therefrom for distant use before he subdivided the land. From him plaintiff acquired blocks 153, 190 and 191, making ninety acres in all. Block 191 was set out in fruit trees requiring irrigation, and on this block plaintiff's five wells and pumping plant were situated. (The other blocks he was not irrigating, but they were irrigable, as shown by experiment.) Defendant succeeded in title to, and all rights of, a neighboring parcel known as block 192, on which were the original seven wells of the common grantor, and from them defendant pumped water for distant use by itself and for sale to others on distant land.[1]

Plaintiff's use had begun first, and he was using twenty-five inches six days each month at the time defendant later began taking one hundred and twenty-five inches. Defendant's pumping lowered the water level of plaintiff's wells twenty-one feet,[2] being a depth below the intake of plaintiff's pumps, and beyond their capacity, preventing them from raising any water. This lowering of water plane was in part permanent (a lowering of seven feet remaining even when defendant ceased pumping), and would be likely to go permanently lower still, by exhaustion of the basin.

It was held that plaintiff, for his block 191, on which he was actually using the water, had the right to continue using twenty-five inches six days each month, and defendant was enjoined from pumping during that time; and for plaintiff's other blocks, 153

lands of the plaintiff and defendant are situated over a subterranean basin or reservoir containing percolating water; that the defendant is appropriating said water and carrying the same to lands not over said basin and distant two or more miles therefrom, to be there distributed and used; that upon a part of the plaintiff's land he was using the water of said basin long before the defendant began the appropriation complained of, but that upon a large part of it he has never used said water, and he claims the right to restrain the taking by the defendant so as to preserve sufficient water in the basin for use on the last-mentioned lands in the future, should he desire to make use of it thereon. The rights of such parties, under such circumstances, were expressly left undecided in Katz v. Walkinshaw. (141 Cal. 135.) It should be referred to the court in bank upon full argument. It is ordered that the submission herein in department be set aside, that the cause be heard before the court in bank and that it be placed on the Los Angeles calendar of the April session, 1908, for such further argument upon the question as may be presented." Subsequently, the court rendered its decision as stated in the text.

[1] The underground water lay in a catchment basin of water-bearing strata abutting upon an impervious dike which impounded the water in these strata, and all plaintiff's land, together with defendant's land where lay its wells, overlay this basin, while the distant land, to which defendant took the water, did not. There was no stream involved; the water was broadly diffused.

[2] From nine feet below the surface to thirty feet below.

and 190, on which no use was being made as yet, plaintiff had a right, on giving ten days' notice, to begin use, pumping a necessary quantity at reasonable times, during which times also defendant must cease pumping. During the remaining times, defendant may pump the water and take it for distant use, so far as his taking does not exceed the repletion of the supply to the basin from annual rainfall, or lower the water level in plaintiff's wells below the capacity of his present pumps; provided only (on petition for rehearing) that these last two limitations shall not apply to the thirty inches which defendant may take as successor to the original common grantor. These thirty inches, at all events, he may take at any of the times during which he is allowed to pump at all.

Thus (leaving out the thirty inches which seem to rest on contract and as to which the court gave no reasons), plaintiff was declared to have a right to the amount necessary for use on all his land, whether using it or not. For the blocks now in use, "Under the rules stated, therefore, the right of the plaintiff to the quantity of water necessary for use on block 191 [on which he was actually using the water] is paramount to that of the defendant to take the water to the distant land of the interveners and others similarly situated. The defendant is entitled only to take of the surplus after block 191 is supplied." As to the necessary quantity actually here used by plaintiff, defendant is absolutely enjoined. For the blocks not yet in use, also, he is entitled to relief, for the water, although not yet there used, is its chief element of value;[3] but not to a prohibitive injunction until some use there begins; in the meantime the form of the relief will there be limited to "prevent the destruction of his source of supply" and "to protect him in his right to *thereafter* use such water on his land, and thus prevent the appropriator from defeating such landowner's right, or acquiring a paramount right by adverse use or by lapse of time." The decree was accordingly as to such land phrased similarly to a

3 "The land being so situated that it has the natural advantages afforded by the underlying water, the conditions are analogous to those affecting land riparian to a stream, which, because of its situation with reference to the stream, is given rights to the waters thereof, *so far as necessary for use thereon*, which are paramount to the right of another riparian proprietor to divert the water to lands not riparian. The reasonable rule here would be to hold that the defendant's appropriation for distant lands is subject to the reasonable use of the water on lands overlying the supply, particularly in the hands of persons who have acquired it because of these natural advantages, and we therefore hold this to be the law of the case with respect to the lands upon which no water has been used by the plaintiff."

decree quieting title, declaring plaintiff's right to be as stated, and enjoining defendant from ever hereafter denying such right, but refusing to enjoin defendant from continuing his use during the nonuse of plaintiff. The terms of the decree we stated above in detail.

Upon another appeal in the same case, these principles were affirmed.[3a]

In a word, no taking for distant use will be valid which does permanent damage to the local land or depreciates its value or may in the future damage a neighbor in the use of his land; but is valid in the absence of such damage and to the extent of such absence of damage; and until such damage should accrue, the complaining party can have only a declaratory decree, and not a prohibitive injunction.

(3d ed.)

§ 1054. **Barton v. Riverside Water Co.**[4]—There was an underground water-bearing basin in the San Bernardino Valley (it being conceded that no stream was involved, though one existed in the vicinity), from which the Riverside Water Company had been pumping, from its present wells, water to supply the town of Riverside for at least nine years. Plaintiff, a landowner over the same basin, was held, irrespective of any question what his rights might have been, to be barred of equitable relief under the rule that "where the complainant has stood by while the development was made *for public use,* and has suffered it to proceed at large expense to successful operation, having reasonable cause to believe it would affect his own water supply, the injunction should be refused." The court further said that Katz v. Walkinshaw was a change in the law intervening, and said (italics ours):

3a Burr v. Maclay Rancho Water Co. (L. A. No. 2284), —— Cal. ——, —— Pac. ——, decided June 22, 1911. The court here said, among other things: "The existence of streams or bodies of water extending from plaintiff's lands to lot 192 is not essential to plaintiff's case. Under the doctrine established in Katz v. Walkinshaw, *supra*, and subsequent cases of similar effect, the existence of a common supply of water in a state of percolation of such a character that the taking from one overlying tract will substantially diminish the quantity available in another overlying tract, gives correlative rights in the common supply and creates a right in one such landowner to prevent another from taking the water to distant lands not overlying the common supply, if such taking is injurious to him."

The court here further considered the thirty inches by which the parties were bound under the reservation in the conveyances of the common grantor.

4 (1909) 155 Cal. 509, 101 Pac. 790, 23 L. R. A., N. S., 331, Shaw, J.

"The decision in Katz v. Walkinshaw was rendered, and the previous cases on the subject of percolating waters thereby *overruled,* because of our conviction that the doctrine that the owner of the soil was the absolute owner of the waters percolating therein and could extract the same at will, regardless of the effect on other lands, is unsuited to our conditions and would constantly tend to produce injustice and render insecure the title to water supplies devoted to beneficial use. The doctrine of correlative rights in such waters, declared in that case, was adopted because it was deemed necessary for the protection of present and future uses of such waters against the unreasonable and remediless invasions that would be allowable under the doctrine of absolute and irresponsible ownership. It was perceived that the decision would be regarded as an innovation and that it might cause suits to be begun to prevent the continuance of uses of such waters previously made. While adhering to and fully approving the doctrine announced in Katz v. Walkinshaw, especially in respect to uses of percolating water having their beginning after that decision was made, we desire to say that a clear case must be made to justify an injunction to prevent a continuance of the beneficial use of such waters, begun in good faith before that decision and which was in full operation at that time, which is the condition presented by the case at bar. This action was begun only a few months after that decision became final."[5]

Another water company, the Riverside Highland Water Company, also supplying water to distant lands, had originally obtained its supply from flowing wells, the right to which was not in dispute, but owing to drought these wells had ceased flowing, whereupon it bored new *pumping* wells in another place over the same basin, but too recently to invoke the foregoing estoppel. Its right to do so was upheld as a change only in the mode of exercising its right, and not a change in the right itself, relying upon a similar rule regarding change of point of diversion of surface streams.[6] The same was held as to new wells of a third water company, the West Riverside Water Company, which company could not have invoked the estoppel first mentioned for the further reason that it was not in public service, but a mutual company supplying only its stockholders and not the general public.

[5] See further quotation, *infra,* sec. 1171.

[6] *Supra,* sec. 504.

This case thus found it unnecessary to discuss the acquisition of right, for as to the last two companies their original right was assumed and not disputed, the only question being as to a change in the mode of its exercise; while as to the first, plaintiffs were estopped by conduct of any right to injunction.

(3d ed.)

§ 1055. **Hudson v. Dailey.**[7]—There was a stream flowing from the mountains to a broad valley, and the underground conditions caused the stream water, on entering the valley, to leave the channel and diffuse by percolation underground in the broad valley, and gather again toward the stream channel where it entered certain Narrows at the lower end of the valley. At the Narrows the surface stream flow never ceased, but for many years use in wells in the broad valley by the various parties had caused an absence of surface flow above the Narrows. Plaintiff owns riparian land below the Narrows, and has been taking water from the surface flow there for about thirty years, using it on this riparian and also (*semble*) on nonriparian land belonging to her. Defendants are owners of land in the upper broad valley, where they separately get water from wells for use on their own land, most of which does not abut upon the now dry channel; and this, together with an unusual drought, has caused the surface flow to diminish where it reaches plaintiff.[8] Plaintiff brought this action to quiet title to a fixed amount of water and enjoin all use by defendants so far as it diminishes the surface flow to her below that amount.

It was held that if the diffusion in the broad valley is such that the water still retains its character as a part of the stream, though underground, "then the defendants' lands overlying such water must be considered as also riparian to the stream, and, under the law of riparian rights, they have a common right with the plaintiff to the use of the water." But the case was considered chiefly on the assumption that the underground diffusion in the broad val-

[7] 156 Cal. 617, 105 Pac. 748, Shaw, J.

[8] "Her land, or the part of it upon which she uses the water, is riparian to the creek. She, and her predecessors in interest, by means of a dam and open ditch, have diverted the water from the creek at a point below any of the lands of the defendants, and have used it upon her land ever since the year 1868, under claim of right, to the extent of about two hundred and fifty miner's inches, whenever the stream was large enough to furnish that amount. The diversions of the defendants by their wells have materially contributed to the diminution of the surface stream, and have, to that extent, deprived her of the water."

ley was too remote from the channel to have retained its character as part of the stream; and that defendants' lands must be regarded as nonriparian to the stream. That being so, it was held that the stream on the surface and the underground diffusion of percolating water, while in the broad valley, were so connected that, though not one actual stream, they were nevertheless a continuous and common supply of water, in which all lands having access thereto in their natural situation are entitled equally to a reasonable use at any time, and exclusive or paramount rights can be obtained by none, whether because of nonuse of others or because of any other reason than grant, condemnation or prescription. Plaintiff having failed to plead or prove that any of the defendants were exceeding a reasonable use, she was held not to have made out a case.[9]

Mr. Justice Shaw said: "There will always be great difficulty in fixing a line, beyond which the water in the sands and gravels over which a stream flows and which supply or uphold the stream, ceases to be a part thereof and becomes what is called percolating water. Undoubtedly the water in the lands of many of the defendants would be of the class ordinarily designated as percolating water. It is therefore important to determine the relative rights of the owner of the nonriparian land containing percolating water, which feeds a surface stream, and those who have acquired riparian or prescriptive rights in said stream, where the pumping of such percolating water and its use on the land in which it is found will diminish the surface stream, to the injury of those having such riparian or prescriptive rights therein.

"The owner of land has a natural right to the reasonable use of the waters percolating therein, although it may be moving through his land into the land of his neighbor, and although his use may prevent it from entering his neighbor's land or draw it therefrom.

9 "The general rule, as now established by the decisions of this court, undoubtedly is that where two or more persons own different tracts of land, underlaid by porous material extending to and communicating with them all, which is saturated with water moving with more or less freedom therein, each has a common and correlative right to the use of this water upon his land, to the full extent of his needs if the common supply is sufficient, and to the extent of a reasonable share thereof if the supply is so scant that the use by one will affect the supply of the others. Applying this rule, and assuming for the present that the right of the plaintiff is not paramount to that of the others, there can be no doubt that the taking of a part of the underground waters by the defendants is not unlawful, unless they take an unreasonable share thereof. As there is no presumption that the part so taken by any defendant exceeds his reasonable share, it would be incumbent upon the plaintiff to prove it, and as she had made no attempt to do so, she cannot prevail against them."

This right arises from the fact that the water is then in his land so that he may take it without trespassing upon his neighbor. His ownership of the land carries with it all the natural advantages of its situation, and the right to a reasonable use of the land and everything it contains, limited only by the operation of the maxim, '*Sic utere tuo ut alienum non laedas.*' It is upon this principle that the law of riparian rights is founded, giving to each owner the right to use the waters of the stream upon his riparian land, but limiting him to a reasonable share thereof, as against other riparian owners thereon. We think the same application of the principle should be made to the case of percolating waters feeding the stream and necessary to its continued flow. There is no rational ground for any distinction between such percolating waters and the waters in the gravels immediately beneath and directly supporting the surface flow, and no reason for applying a different rule to the two classes, with respect to such rights, if, indeed, the two classes can be distinguished at all. Such waters, together with the surface stream supplied by them, should be considered a common supply, in which *all who by their natural situation have access to it have a common right*, and of which they may each make a reasonable use upon the land so situated, taking it either from the surface flow, or directly from the percolations beneath their lands. . . . . She and they alike must depend solely on their natural rights for the determination of the quantity they may take from this common supply. As she has failed to allege that they have taken or threaten to take more than a reasonable proportion of the water, and as she had no right superior to theirs, she has not established a cause of action against them with respect thereto." [10]

The case has clearly merged the common law of riparian rights and the new rule of percolating water; thereby laying finally aside the doctrine of "appropriation" or exclusive right by priority of use as to percolating water, and inferentially (but inferentially only) also the doctrine that in the law of riparian rights a non-riparian diversion is a wrong *per se*, since in the new law of percolating water the contrary is now well settled.

10 To one defendant (Currier), who took from a well for use, not on the well-lands, but carrying the water away to another valley, the doctrine of reasonable use would not extend, but action against him was held barred by prescription, as it was also as to certain other defendants, by laches.

This is the first case where the conflict was between parties using the water on their own lands. Each was held entitled to a reasonable use, though this involved hardship and damage on one who had used the water first, so long as the damage was not proved to be excessive.[11]

(3d ed.)

§ 1056. **Los Angeles v. Hunter.**[12]—The Los Angeles River headed in the San Fernando Valley, a cup-shaped depression of many square miles in a mountain circle filled irregularly from surface to bottom with loose gravel and other porous material, in which water accumulated from the mountain run-off and other sources, and moved underground to the outlet of the valley at a point where, because of narrowing mountains and rising bedrock, water gathered on the surface as the Los Angeles River. Likewise, "the waters of the Los Angeles River proper entering the valley sink to bedrock and spread out laterally, filling all the voids of the soil, and so move slowly down to the Narrows, where the Los Angeles River, owing to the declension in that direction of the land surface, appears as a visible stream." These ground-waters, while yet in the valley, could not be regarded as themselves partaking of the nature of a river, but were held to constitute an underground lake which was the source of the river. A map showing the valley is given on a later page.[12a]

The river as such was claimed by the city of Los Angeles under its "pueblo right."[13]

Defendants were many landowners in the San Fernando Valley, who had sunk wells for use of their own lands, which drew from this underground supply, appreciably diminishing the surface flow of the river below the valley, and claimed the right to do so for the use of their own lands.[14] This, it was held, would ordinarily be

11 The damage caused by one of the defendants using the water away from his land where originally taken was inferentially held wrongful without regard to any question of reasonable degree—the test of reasonableness governing only between those who were using the water on their own lands on which taken from its natural situation.

12 (1909) 156 Cal. 603, 105 Pac. 755, Henshaw, J.

12a *Infra*, page 1035.

13 *Supra*, sec. 68.

14 "So it is insisted by appellants that these waters are strictly percolating waters, and that of them they have the common-law right of absolute ownership, as modified in this state only by the doctrine of Katz v. Walkinshaw, *supra*, namely, that the *quantum* of water which they use shall be in reasonable proportion to the whole thereof, and that the water so taken shall be used upon the surface soil of the basin, or, at least, not carried away for exterior use, to the injury of any owners of the land within the basin."

a proper contention; but, because of the peculiar paramount "pueblo right" of Los Angeles in the river with which the ground waters were so intimately connected, the landowners' rights to use their own lands were overridden in this exceptional case, and an exclusive right in the ground-waters accorded to the city as a part of its exclusive right to the river which they supplied. Mr. Justice Henshaw said: "Unquestionably the San Fernando Valley is the great natural reservoir and supply of the Los Angeles River. Unquestionably the cutting off of this supply would as completely destroy the Los Angeles River as would the cutting off of the Great Lakes destroy the St. Lawrence. San Fernando Valley may indeed be regarded as a great lake filled with loose detritus, into which the drainage from the neighboring mountains flows, and the outlet of which is the Los Angeles River. Impeded by the soils, these waters of course move more slowly than they would in an open lake. But unquestionably the general movement of practically all is southeasterly to the Narrows, through and out of which flows the Los Angeles River proper. Unquestionably, also, a serious interruption of or interference with this supply would as certainly impair the volume of water carried by the Los Angeles River as though the interruption and interference were with a surface-flowing tributary thereof. The waters of the San Fernando Valley, therefore, are not percolating waters in the common-law sense of the term—vagrant, wandering drops moving by gravity in any and every direction along the line of least resistance. These waters percolate, it is true, but only in the sense that they form a vast mass of water confined in a basin filled with detritus, always slowly moving downward to the outlet, in the effort, in conformity with physical law, to attain a uniform level. If it be here conceded that the city of Los Angeles has the paramount right to the use of the waters of the Los Angeles River, then the abstraction of waters from this valley is as clearly an interference with that right as it would be if the valley, instead of being filled with debris, were an open lake from which the river drew its whole supply. . . . . If, as here contended and found, the city of Los Angeles has paramount right to the use of all the waters of the river, then, under the doctrine thus enunciated, none of these so-called percolating waters may be withdrawn to the invasion and injury of such right."[15] And it was held that, by virtue of its paramount right as successor

[15] Citing Hudson v. Dailey (1909), 156 Cal. 617, 105 Pac. 748.

of the Pueblo de Los Angeles, obtained while under Mexican sovereignty, the city had such a paramount right, and some two hundred and seven landowners in the San Fernando Valley were enjoined from taking any water by wells or otherwise, though for use on their own lands, at any time when the city was demanding the entire surface flow of the Los Angeles River.

Here a taking for distant use was allowed to override the use by a landowner of his own land; but taken with Hudson v. Dailey, very similar in facts, where no exclusive right was permitted, it shows that the Los Angeles case rested upon the exceptional fact of the pueblo right, and probably also is influenced by the greater public interest in favor of upholding the water supply of the city of Los Angeles.

(3d ed.)

§ 1057. Miller v. Bay Cities W. Co.[16]—The Coyote River has its watershed of over two hundred square miles in the Eastern Coast Range Mountains, issuing therefrom at the base of Mount Hamilton, in a gorge called the Upper Gorge. The river flows thence about seven and one-half miles through the Coyote Valley, which is comparatively narrow, losing part of its flow here by seepage. The Coyote Valley ends at a second gorge called Lower Gorge, whence both the surface stream and the underground seepage enter the Santa Clara Valley, the stream on the surface flowing down that valley through San Jose to the Bay of San Francisco, and the seepage through the Lower Gorge (joining further seepage from the river as it flows on, and seepage from other sources) spreading out in wide diffusion under the Santa Clara Valley, twenty miles square.

The Santa Clara Valley is one of the richest and most highly cultivated parts of the State. Its floor to great depth is composed of an irregular mass of gravel and other loose material, very pervious to water.[17] The underground flow into the valley gravels amounts to twenty million gallons daily, is "constant and continuous," and found by the court to be solely due to seepage from the Coyote River at the Lower Gorge.[18]

[16] (1910) 157 Cal. 256, 107 Pac. 115, 27 L. R. A., N. S., 772, Mr. Justice Lorigan.

[17] The court mentions something about distinct "underground channels."

[18] A possible contribution from another watershed of eight square miles below the gorge was held too trivial to consider, when compared with the two hundred square miles of Coyote watershed. Within two years, the court finds, all flow through the Lower Gorge gravels into the valley gravels would cease if supply thereto from the

Plaintiff in the Santa Clara Valley four miles below the Lower Gorge has twenty-four and one-half acres of land (twenty-three and one-third acres being orchard and three-fourths of an acre being alfalfa), all of which land is *nonriparian* to the stream. He has a well on the land ninety feet deep, which he uses once a year for twenty days to irrigate his orchard, and two days five or six times a year to irrigate his three-fourths of an acre of alfalfa. This well was in a stratum of gravel under pressure, constantly supplied from the sinking waters of the Coyote River.

Defendant company (organized to supply water to the City of San Francisco outside of the valley) at the Upper Gorge had posted notices of appropriation (under sections 1410 to 1422 of the Civil Code concerning the law of appropriation), and proposed a surface dam and reservoir; at the Lower Gorge defendant already had a large and extensive pumping plant, with wells seventy-six feet deep and tunnels at their bottom, machinery and houses to cover the same, and proposed a subsurface dam also. The court found, in short, that "the intention of defendants was to divert, unless restrained by the court, all the waters of the Coyote River, both surface and subsurface," and "that the defendant corporation, unless restrained, threatened to divert and carry the waters of the river beyond their own lands for sale as merchandise, prevent them from returning to the river or gravel bed," and "if they were so diverted by defendants would be without sufficient water to enable plaintiff to irrigate his orchard or land," and "the plane of water in the gravel below the Lower Gorge would be lowered to such an extent that it would be below the intake of the gravel stratum in the land of plaintiff and his well thereby be entirely deprived of water."

The opinion is very long. By way of introduction concerning Katz v. Walkinshaw, which dealt with diffused percolating water unconnected with any stream, the court says: The common-law right under the *cujus est solum* doctrine ("and as an appropriator the appellants insist upon this right") has been modified by the application of the doctrine of *sic utere tuo* so as to preserve to each owner of lands overlying a common stratum of percolating

river were cut off, and the gravels in Santa Clara Valley would not yield enough water for irrigation; and even with the supply continuing naturally, continuous and extensive irrigation by the valley landowners is already gradually lowering the water plane.

waters a right to a fair and reasonable use of these waters of which their lands have a natural advantage.[19]

The first new point of law actually involved in the case at bar arose from the fact that plaintiff was seeking to restrain the diversion of a surface stream, although his land did not touch upon and was not riparian to the surface stream, nor had plaintiff ever taken any surface water therefrom as an appropriator—he claimed no surface right, as such, in the stream, but relied solely upon his well against a stream claimant.[20] That matter, the opinion says, has not been heretofore presented, and now in effect holds, as was held in Hudson v. Dailey, that because of the close connection between the surface and underground water, it should all be regarded as one general supply, for the common use of all lands having access by natural situation to any part of it. This (against

[19] Mr. Justice Lorigan said in that regard: "It would be a waste of time to particularly discuss the reasons which impelled the modification of the common-law doctrine. . . . . The climatic conditions of this State, the great stretches of arid and semi-arid lands, the uncertainty of the seasons and varying rainfall, the necessity of irrigation and the vast superiority of underground waters as a steady and ready means of irrigation over the uncertainty of a similar supply from a surface stream which, in many instances, becomes dry at the very time when irrigation is necessary; the vast areas of land brought under cultivation and production by irrigation and additional areas still to be improved by it; the enormous draft which this constant improvement and cultivation makes on a supply which is limited and which will become inadequate for all as population increases and additional lands are to be brought under cultivation and improved by irrigation; these, and many other causes, impelled a departure from the old doctrine and a limitation of it and the adoption of the just principle that a common and essential necessity—water—when supplied to well-defined strata from whatever source should be preserved to lands overlying them for reasonable use upon them. In Katz v. Walkinshaw, *supra*, in the opinion written by the late Justice Temple, and in that written by Justice Shaw upon a rehearing (granted for further argument), the necessity for the modification of the *cujus est solum* doctrine as inapplicable to the conditions in this State was fully discussed, announced and applied. . . . . Defendant asserted there, like appellants as appropriators do now, that as these were percolating waters he had, under the common-law rule to which we have just adverted, an absolute right to abstract them to any extent he saw fit and to use them anywhere he pleased, notwithstanding it would result in depriving the well of plaintiff of any supply for irrigation. The common-law rule was rejected as inapplicable to the conditions in this State and the rule of *sic utere tuo* announced, and applying it, it was held that the rights of the parties in the suit to take these particular waters were correlative, and that the defendant could not divert them for sale elsewhere so as to prevent plaintiff from obtaining a reasonable supply for irrigation and other ordinary uses upon his land. The doctrine thus announced in this pioneer case has been subsequently followed so that the rule is now settled beyond further question."

[20] "It is insisted by the appellants, first, that as the plaintiff is a nonriparian owner, he has no right to enjoin to any extent the diversion of the waters of the stream by an appropriator, on the ground that the stream contributes percolating waters to the nonriparian lands."

distant use) is "a primary right to the full flow of such waters," including the stream, so far as the stream flow is necessary "to bring his stratum up to its water-bearing capacity," which right is "part and parcel of his land," "a vested right" of which plaintiff cannot be deprived except by condemnation on eminent domain, and "the right of plaintiff to have the flow of these waters in his stratum uninterrupted is paramount to the right of defendants to divert them for use elsewhere as the court found they intended to do, to the irreparable injury of plaintiff, and plaintiff was entitled to a decree enjoining such diversion," and "It makes no difference in his rights, as against an appropriator of the water, from what source the supply comes which directly supplies his water-bearing stratum."

The matter is discussed in the opinion at great length. It is pointed out that this is the common-law rule between riparian owners on a stream alone, and is the rule of percolating water under Katz v. Walkinshaw, where no stream is involved, and the court sees no reason why the principle is different where the two are joined together in nature upon the facts. Where a large community in the Santa Clara Valley is dependent thereon, should it be that "that territory can be deprived of this inestimable benefit by an appropriator seeking to divert all the waters of the river away from the stream as a commercial proposition, thus rendering the lands overlying the various artesian strata valueless"? The same principle should be applied, to reach justice, as is applied under the common law of riparian rights. Landowners in the valley, whether touching the stream or not, are entitled against each other to a reasonable use of their own lands by means of this common supply, whether they take by ditch from the stream or by well from the groundwater; while against a taker for use off his own land there is no question of reasonableness, and they are entitled to enjoin absolutely any taking either from the stream or from a well which would diminish the value of the valley lands or interfere with their use to any extent whatever, even in the future, by impairment of underground water supply. No "appropriation" by one will give a right in such case, and the "appropriator" has the burden of proof if he asserts that there is a surplus that can be taken without such interference.[21]

21 "While the owner of the underground stratum is only entitled to the flow of the flood waters to the extent that they may replenish his water-bearing stratum, still his right to the accustomed flood flow of the stream

The second of the main points in the case arose out of the fact that the Coyote River is torrential, flowing chiefly in times of sudden flood, defendant claiming that, granting the foregoing as to the normal stream flow, it should not extend to the storm waters.[1] The court says such distinction might, perhaps, be made, if the storm waters were occasional only, and served no useful purpose, but does not lie in this case, because they are of annual occurrence, and serve a useful purpose in keeping the ground-water under pressure, so as to keep the valley water plane at its present level, saying: "But in the case at bar there can be no question but that the flood waters perform not only a useful but an indispensable service in pressing into the gravel beds or trough at the Lower Gorge by their great breadth and enormous weight a large portion of the waters which go to supply the various artesian strata, including that of plaintiff, which have their intake therein." Likewise not only the pressure, but the volume of the ground-waters was held dependent upon the storm flow of the river, saying the underground volume is proportionate to the height and breadth of the storm waters in the river, which even when undisturbed do not fully supply the capacity of the gravels, and withdrawal of but a portion of even the storm waters would prevent plaintiff's irrigation from his well.[2]

for that purpose is paramount to that of the right of an appropriator to divert any of the waters for use beyond the watershed," and "if the accustomed flow is more than necessary to supply the underground stratum, the burden of proof is upon the appropriator seeking to appropriate the surplus to show that there is a surplus."

Defendants suggested an artificial plan to release sufficient water from their proposed works to preserve the normal conditions, taking only the surplus, but they were held not to have sustained the burden of proof of the feasibility of that plan.

1 See *supra*, sec. 825.

2 The following are some expressions used by the court in this regard: "The flow of these storm waters during the recurring heavy rains is absolutely necessary to sustain the supply of water thereto which would otherwise and in a few years be exhausted." "These intakes amounted in some seasons to from three hundred to five hundred million gallons a day during a single storm." "Twenty million gallons which year in and year out daily percolate over the gorge and which is designated as the normal flow of the river, but it is quite evident that this quantity of itself, and save for the immense quantities which are supplied by the annual storm waters, would not sufficiently meet the needs of those hundreds of property owners whose land is situated above the various old branch channels, all having their intake into the gravel beds at the Lower Gorge, and who draw water for their irrigation from wells sunk in these various water-bearing gravel strata." "There was no 'waste or loss' of the storm waters until, at least, they had served the essential and necessary purpose of supplying to plaintiff their force and volume in forcing such supply into the vast gravel beds in which the various underlying strata referred to had their intakes and had flowed over these gravels on their way to the bay." "Performing this necessary and indispensable service, which could not be supplied without them, no part of them can be said to be waste waters

In this case, as in Hudson v. Dailey, the stream and ground water were treated as one common supply for all lands having natural access to any part of it, and the similarity of this to the common law of riparian rights is again declared. In Hudson v. Dailey the defendants were upheld as making a reasonable use *of their own lands* though diminishing the stream; while in the Bay Cities case the defendant was enjoined from diminishing the stream because it would diminish the ground-water to such an extent as to depreciate the lands of other owners (and interfere with their possible use, both present and future), by a taking for use *off the defendant's own land*, and sale beyond the watershed.

This case, like Hudson v. Dailey, also decides that the law of exclusive right by priority of appropriation has no place in the new law of percolating water; and that the latter is very similar to the common law of riparian rights.

(3d ed.)

§§ **1058–1061. Various Subordinate Rulings.**[3]—These cases are stated elsewhere, having discussed chiefly rights in streams, and the question of diffused percolating water unconnected with streams was subordinate to the stream rights.[4]

We here, however, quote specially from the closing paragraph in the Mentone case: "If the acts of the defendants do not damage the plaintiff, and do not diminish the water which would naturally flow to its place of diversion, it is immaterial whether the pipe-line diversion was made before or after the inception of plaintiff's appropriation," or how far the return of certain water was distant from a certain dam. That is, the question of damage is the essential one, and the date or priority of use is not.

until they have performed it, as far as they are capable of doing so, and have passed over the gravels on their way to the bay." As between these two (the effect of the storm waters on the pressure and on the volume), the latter is held the one of more importance, saying: "The right of a person owning land upon a channel of underground water is not measured by whether the water is under pressure or not, but by considering whether the waters come to him in a natural defined flow so as to constitute a part or parcel of his lands."

Shaw, J., concurring, thought that as to the storm waters the case was exceptional because the public interest here balanced in favor of the injunction, while usually he thought the balance of convenience, as regards the public, would be against an injunction.

3 Verdugo W. Co. v. Verdugo, 152 Cal. 655, 93 Pac. 1021; Huffner v. Sawday, 153 Cal. 86, 94 Pac. 424; Pomona W. Co. v. San Antonia Co., 152 Cal. 618, 93 Pac. 881; Mentone Irr. Co. v. Redlands Co., 155 Cal. 323, 100 Pac. 1082, 22 L. R. A., N. S., 382; Perry v. Calkins (Cal. 1911), 113 Pac. 136.

4 *Supra*, secs. 38, 39; *infra*, sec. 1077 et seq.

(3d ed.)

§ 1062. In the District Court of Appeal.—"Water passing through the soil, not in a stream, but by way of filtration, is not distinctive from the soil itself; the water forms one of its component parts. In this condition it is not the subject of appropriation."[5] Adding that definite streams, however, are none the less subject to appropriation (on the surface) because issuing from wells or springs; subterranean interference with the flow on the surface not being attempted. The point to be noted is that the theory of the old rule is adopted and not considered abrogated *in toto*.

In another it was said: "This water, the ownership of which until actual possession is acquired being in the public, or at least that portion of the public who may own the surface of the soil within the artesian belt, is subject to a reasonable use only by those interested therein. This reasonable use is determined in Katz v. Walkinshaw[6] to be the use of such amount of the subterranean water 'as may be necessary for some useful purpose in connection with the land from which it is taken.' The conditions existing in this State with reference to the necessity for the conservation of irrigating waters are most clearly set out in the case last cited, and the reason for the rule restricting the use clearly shown. Whenever a landowner exceeds this reasonable use, he is appropriating to himself that which belongs to others who are entitled to a like use, and to that extent is obstructing the free use of property so as to interfere with its comfortable enjoyment, and which, by sections 3479 and 3480 of the Civil Code, is declared to be a public nuisance. . . . . As we have before attempted to show, no surface owner possesses the right to extract the subterranean water in excess of a reasonable and beneficial use upon the land from which it is extracted. Any additional extraction is not in the exercise of a right if by such exercise the rights of the others are injuriously affected." And held that the use of artesian wells could be regulated by statute.[7] In saying that percolating water "belongs to the public," a new phrase is introduced, suggestive of the term "*publici juris*" as used with regard to the water in watercourses.[8] The language in Ex parte Elam certainly resembles the common law of running streams.

[5] De Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. 1001.

[6] 141 Cal. 134, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236.

[7] Ex parte Elam, 6 Cal. App. 233, 91 Pac. 811.

[8] *Supra*, c. 1.

The insistence on damage to the complaining party is also to be noted.

In a late case it was said that there is no difference between the new percolating water law and the law of riparian rights on streams, and a landowner with a well on his land for its benefit may have an action against a well dug on a neighboring highway under grant of a city, where the latter was for distant use and deteriorated plaintiff's land.[9]

(3d ed.)

§ 1063. **Miscellaneous Recent Eastern Rulings.**—We give here some of the various rulings in recent cases from many jurisdictions other than California laying down the doctrine of reasonable use.[10]

As between two parties both seeking local use, it has been held proper for defendant to use the water for hotel purposes,[11] or for a public bath-house.[12] For proper purposes by both on their own land, each must not take more than a reasonable share.[13]

Waste is not proper either against a neighbor seeking use on his own land,[14] or even against another seeking distant use off his land, such as against a city supply water company, or a bottling company shipping mineral water away for sale.[15]

Lowering of water plane seventy-five feet so as to make the water inaccessible has been held ground for injunction;[16] but not a lowering of only ten feet, the water still remaining readily accessible.[17]

That the water lay in an underground reservoir (artesian or otherwise) was made a point in some of the cases.[18]

9 Bonetti v. Ruiz (Cal. App.), 113 Pac. 118.

10 See list collected at end of this chapter.

11 St. Amond v. Lehman, 120 Ga. 253, 47 S. E. 949; Hamby v. City of Dawson, 126 Ky. 451, 104 S. W. 259, 12 L. R. A., N. S., 1164; Pence v. Carney, 58 W. Va. 296, 112 Am. St. Rep. 963, 52 S. E. 702, 6 L. R. A., N. S., 266.

12 Willis v. City of Perry, 92 Iowa, 297, 60 N. W. 728, 26 L. R. A. 124.

13 Pence v. Carney, 58 W. Va. 296, 112 Am. St. Rep. 963, 52 S. E. 702, 6 L. R. A., N. S., 266. Either may take all, *semble*, Houston Ry. v. East, 98 Tex. 146, 107 Am. St. Rep. 620, 81 S. W. 279, 66 L. R. A. 738, 4 Ann. Cas. 827; Forbell v. N. Y., 164 N. Y. 522, 79 Am. St. Rep. 666, 58 N. E. 644, 51 L. R. A. 695.

14 Gagnon v. French etc. Co., 163 Ind. 687, 72 N. E. 849, 68 L. R. A. 175; Barclay v. Abraham, 121 Iowa, 619, 100 Am. St. Rep. 365, 96 N. W. 1080, 64 L. R. A. 255.

15 Pence v. Carney, 58 W. Va. 296, 112 Am. St. Rep. 963, 52 S. E. 702, 6 L. R. A., N. S., 266; St. Amand v. Lehman, 120 Ga. 253, 47 S. E. 949; Stillwater Co. v. Farmer, 89 Minn. 58, 99 Am. St. Rep. 541, 93 N. W. 907, 60 L. R. A. 875.

16 Willis v. City of Perry, 92 Iowa, 297, 60 N. W. 728, 26 L. R. A. 124.

17 Newport v. Temescal W. Co., 149 Cal. 531, 87 Pac. 372, 6 L. R. A., N. S., 1098.

18 Pence v. Carney, 58 W. Va. 296, 112 Am. St. Rep. 963, 52 S. E. 702, 6 L. R. A., N. S., 266; Barclay v. Abraham, 121 Iowa, 619, 100 Am. St. Rep. 365, 96 N. W. 1080, 64 L. R. A. 255;

Some cases laid stress on the fact that the party complained of knew the probable results in advance, and proceeded anyway, though without any ill-will toward the other party.[19]

The New York cases have laid stress on the fact that the means of use (heavy pumps) were excessive, putting a compulsion upon the underground water, effecting an extralateral trespass similar to the cases of explosions or blasting.[20]

Some of the cases have laid stress on actual malice; such as a desire to ruin a neighbor, or to make him buy out the defendant.[21]

The measure of damages for loss of underground water is held to be the loss of rental value of the land, and not the value of producible crops.[22]

Suit has been brought by the United States Reclamation Service to enjoin well sinking and pumping to the impairment of the water supply of the proposed Garden City Project in Kansas.[23]

Most of the recent cases involved well-sinking to pump water to distant land, such as to supply a city; and in all of such the taking has been absolutely enjoined where it would be detrimental to the land or water supply of an adjoining landowner.[24]

(3d ed.)

§ 1064. Recapitulation of the California Cases.—There have been fourteen cases since and including Katz v. Walkinshaw. Relief was granted in five cases, refused in seven cases, and in two cases granted in part and refused in part. The cases hence now predominate in result against the plaintiff.

Erickson v. Crookston W. Co., 100 Minn. 481, 111 N. W. 393, 8 L. R. A., N. S., 1050, 10 Ann. Cas. 843; Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236.

19 Dickinson v. Grand Junction etc. Co., 7 Ex. 301; Smith v. Brooklyn, 18 App. Div. 340, 46 N. Y. Supp. 141; Forbell v. New York, 164 N. Y. 522, 79 Am. St. Rep. 666, 58 N. E. 644, 51 L. R. A. 695. See, also, Houston Ry. v. East, 98 Tex. 146, 107 Am. St. Rep. 620, 81 S. W. 279, 66 L. R. A. 738, 4 Ann. Cas. 827.

20 Smith v. Brooklyn, 18 App. Div. 340, 46 N. Y. Supp. 141; Smith v. Brooklyn, 32 App. Div. 257, 52 N. Y. Supp. 983; Forbell v. New York, 164 N. Y. 522, 79 Am. St. Rep. 666, 58 N. E. 644, 51 L. R. A. 695; Hathorne v. Sanatorium, 122 App. Div. 87, 106 N. Y. Supp. 544.

21 Gagnon v. French etc. Co., 163 Ind. 687, 72 N. E. 849, 68 L. R. A. 175; St. Amand v. Lehman, 120 Ga. 253, 47 S. E. 949; Hamby v. City of Dawson, 126 Ky. 451, 104 S. W. 259, 12 L. R. A., N. S., 1164.

22 Reisert v. New York, 69 N. Y. App. Div. 302, 74 N. Y. Supp. 673. See, also, Dexter v. Providence A. Co., 1 Story, 387, Fed. Cas. No. 3864.

23 United States v. Sugar & Land Co. (see 8th Annual Rept. of U. S. Reclamation Service, p. 6).

24 E. g., Miller v. Bay Cities Co., 157 Cal. 256, 107 Pac. 115, 27 L. R. A., N. S., 772; Meeker v. East Orange Co., 77 N. J. L. 623, 134 Am. St. Rep. 798, 74 Atl. 379, 25 L. R. A., N. S., 465.

Springs or Streams were involved in most of the cases. Only five cases dealt with purely diffused water.[25]

Underground Reservoir appeared in most of the cases, but only the case of Los Angeles v. Hunter made it the actual ground of decision. There was none present in the McClintock and the two Cohen cases, which nevertheless considered the principle of Katz v. Walkinshaw involved, and was expressly declared unnecessary in the first Cohen case. We hence feel justified in saying (as elsewhere) that the existence of an "underground reservoir" is not an essential point.

Reasoning: The latest cases strongly declare that the principles involved are substantially the same as those of the common law of riparian rights, and it is now clear that the law of exclusive rights by prior appropriation has no place.

Damage: In all the cases granting relief, the presence of damage in respect to plaintiff's land through enjoyment of spring or stream rights, or to the use of his own land where mere diffused percolating water, was insisted upon. In the others, where relief was refused, the absence of such damage or the possibility thereof (except for the reasonable use of his own land by the party complained of) was likewise insisted upon (or an estoppel was invoked against the damage), and was expressly declared to take these cases out of the rule of Katz v. Walkinshaw. We think this the essential point of this new rule, which only modifies the old rule where the complaining party shows damage in respect to his land or to the use (present or future) thereof. The rule is limited, as Mr. Justice Henshaw said, to "circumstances of injury or hardship."

Distant Use by Defendant, when the ground of complaint, was held wrongful, on the showing of such damage, and of any possibility thereof in the future; permitted in the absence of such showing, or, if only future damage, until such damage should accrue, the distant user having the burden of proof.

Local Use, when the ground of complaint, was held wrongful only when excessive, and rightful when the interference caused thereby was a reasonable use of the local land.[1]

Not Present: Among the elements not present in any of these cases may be mentioned distant use of purely diffused percolating water by both parties.[2]

25 The Katz, Newport, Burr, Barton, and second Cohen case.

1 Hudson v. Dailey. With the exception of the Los Angeles pueblo right, Los Angeles v. Hunter.

2 The Montecito and Pomona cases involved a stream.

(3d ed.)

§ 1065. **Conclusions.**—We conclude that but two questions are hence involved in a case under the California rule, to wit:

First: Is the complaining party damaged in respect to his land, or its value, or the use of his land, present or future, or is there an impairment of his rights in a watercourse?

Second: If so, is the damage caused by reasonable use of his own land by the party complained of?

Without such damage, no use whatever of the party complained of is wrongful. With such damage, the damage is wrongful if not done in such reasonable use of his own land (with the exceptional case of the pueblo right of Los Angeles).

In reaching the above results the California rule does not differ from what may now be called the general American rule. Mr. Justice Temple considered that he was laying down the general American rule, though Mr. Justice Shaw regarded it as a rule peculiar to California because of the aridity of the climate and scarcity of water in the southern part of the State;[3] and the Colorado court has also so considered the decision, saying: "The law regulating ownership of percolating waters in the arid States is now of great—as time passes will be of still greater—importance; and until a proper case is presented calling for it, we decline to announce the rule applicable to *our local conditions.* We make this observation in view of the fact that, after the briefs on this appeal were in, the supreme court of California, in a series of cases, has considered this important question, and established for that jurisdiction the rule that the right of an owner of land to use water percolating therein is the right only to a reasonable use thereof for the benefit and enjoyment of his land."[4]

Recent cases throughout the country, however, have laid down the same rule though no aridity of climate was involved.[5] Reviewers all take the same view—that the rule is the prevailing American view and not confined to arid regions, nor resting upon natural scarcity of water or unusual local conditions.[6] In one case, review-

[3] Cf. Lux v. Haggin, 69 Cal. 255, at 311, 10 Pac. 674, saying the court cannot make a separate rule for separate parts of the State.

[4] Smith etc. Co. v. Colorado etc. Co., 34 Colo. 485, 82 Pac. 940, 3 L. R. A., N. S., 1148. See, also, Le Quime v. Chambers, 15 Idaho, 405, 98 Pac. 415, 21 L. R. A., N. S., 76.

[5] Cases cited below.

[6] E. g., 4 Mich. Law Rev. 541, 99 Am. St. Rep. 66, note, 64 L. R. A. 255, note; 18 Harvard Law Rev. 415; Water Supply Paper 122 of the U. S. Geological Survey; 13 Yale Law Journal, 222; 1 Columbia Law Review, 506; 66 Cent. L. J. 194.

ing the recent decisions, this is pointed out, and it is added: "We must yield assent to the latter doctrine of reasonable and beneficial use, *which constitutes rather a qualification of the early rule than an announcement of a new rule.*"[7]

"It is believed, however, that *the prevailing American view* is that, in order to justify the cutting off of another's water supply derived from percolating waters, it is necessary that this should be the result of a reasonable user of defendant's rights in his own lands."[8]

(3d ed.)

§ 1066. **Collection of Recent Cases.**—A collection of the recent cases from various American jurisdictions is given in the note. The opinion in the New Jersey case of Meeker v. East Orange is specially worth reading.[9]

[7] Citing and reviewing the recent cases. Pence v. Carney, 58 W. Va. 296, 112 Am. St. Rep. 963, 52 S. E. 702, 6 L. R. A., N. S., 266, remarking that, though not a substitution of the law of surface streams, the new rule has similarities thereto.

[8] E. W. Huffcut, in 13 Yale Law Journal, 222, reviewing the recent cases. He considers the doctrine, "after all, merely one of social utility."

See Sheehan v. Flynn, 59 Minn. 436, 61 N. W. 462, 26 L. R. A. 632, as to a similar modification of the common law of diffused surface water.

[9] The following are all very recent cases, and some of them cite Katz v. Walkinshaw in support of their ruling:

California.—See list of cases *supra*, sec. 1042.

Colorado.—Smith v. Colorado etc. Co., 34 Colo. 485, 82 Pac. 946, 3 L. R. A., N. S., 1148 (comment only).

Delaware.—Little v. American Tel. Co., 6 Del. 374, 67 Atl. 169 (*dictum*).

Georgia.—St. Amand v. Lehman, 120 Ga. 253, 47 S. E. 949. But see Stoner v. Patten, 132 Ga. 178, 63 S. E. 897.

Idaho.—Comment only, in Josslyn v. Daly, 15 Idaho, 137, 96 Pac. 568; Le Quime v. Chambers, 15 Idaho, 405, 98 Pac. 415, 21 L. R. A., N. S., 76, citing the first edition of this book, which, however, the author has modified in the later editions, in the light of the subsequent California cases.

Indiana.—Gagnon v. French etc. Co., 163 Ind. 687, 72 N. E. 849, 68 L. R. A. 175.

Iowa.—Willis v. City of Perry, 92 Iowa, 297, 60 N. W. 728, 26 L. R. A. 124; Barclay v. Abraham, 121 Iowa, 619, 100 Am. St. Rep. 365, 96 N. W. 1080, 64 L. R. A. 255.

Kansas.—See Gilmore v. Royal Salt Co. (Kan. 1911), 115 Pac. 541; and statutes, *infra*, sec. 1436.

Kentucky.—Hamby v. City of Dawson Springs, 126 Ky. 451, 104 S. W. 259, 12 L. R. A., N. S., 1164; Louisville Co. v. Kentucky Co., 117 Ky. 71, 111 Am. St. Rep. 225, 77 S. W. 368, 70 L. R. A., N. S., 558, 4 Ann. Cas. 355 (*dictum*); Long v. Louisville etc. R. Co., 32 Ky. Law Rep. 774, 107 S. W 203.

Maryland.—Western etc. Co. v. Martin (1909), 110 Md. 554, 73 Atl. 267 (comment only).

Massachusetts.—*Quaere*, as to Hart v. Jamaica Pond Co., 133 Mass. 488.

Minnesota.—Stillwater Co. v. Farmer, 89 Minn. 58, 99 Am. St. Rep. 541, 93 N. W. 907, 60 L. R. A. 875; Erickson v. Crookston etc. Co., 100 Minn. 481, 11 N. W. 391, 8 L. R. A., N. S., 1250, 10 Ann. Cas. 843; Same v. Same, 105 Minn. 182, 117 N. W. 435, 17 L. R. A., N. S., 650; Farmer v. Stillwater Co., 99 Minn. 119, 108 N. W. 824. See, also, Tuttle v. Buck

(1909), 107 Minn. 145, 131 Am. St. Rep. 446, 119 N. W. 946, 22 L. R. A., N. S., 599, 16 Ann. Cas. 807 (*dictum*); Sheehan v. Flynn, 59 Minn. 436, 61 N. W. 462, 26 L. R. A. 632 (surface water).

Missouri.—Springfield W. W. v. Jenkins, 62 Mo. App. 74 (*dictum*).

New Hampshire.—Bassett v. Salesbury, 43 N. H. 569, 82 Am. Dec. 179; Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276. These are old cases.

New Jersey.—Meeker v. East Orange, 77 N. J. L. 623, 74 Atl. 379, overruling S. C., 76 N. J. L. 435, 70 Atl. 360.

New Mexico.—Vanderwork v. Hewes (N. M.), 110 Pac. 567 (comment only).

New York.—Smith v. City of Brooklyn, 18 N. Y. App. Div. 340, 46 N. Y. Supp. 141; Same v. Same, 160 N. Y. 357, 54 N. E. 787, 45 L. R. A. 664; Forbell v. New York, 164 N. Y. 522, 79 Am. St. Rep. 666, 58 N. E. 644, 51 L. R. A. 695; Reisert v. New York, 69 App. Div. 302, 74 N. Y. Supp. 673; Hathorn v. Saratoga etc. Sanatorium, 55 Misc. Rep. 445, 106 N. Y. Supp. 553; Hathorn v. Natural Carbon Gas Co. (1908), 128 App. Div. 33, 112 N. Y. Supp. 374; Same v. Same, 194 N. Y. 326, 128 Am. St. Rep. 555, 87 N. E. 504, 23 L. R. A., N. S., 436, 16 Ann. Cas. 989; People v. N. Y. Carbon etc. Co. (1908), 128 App. Div. 42, 112 N. Y. Supp. 381; Same v. Same, 196 N. Y. 421, 90 N. E. 441; Strang v. New York, 127 N. Y. Supp. 231. See, also, Jager v. New York, 35 Misc. Rep. 622, 72 N. Y. Supp. 131, affirmed in 75 App. Div. 258, 78 N. Y. Supp. 49; Dinger v. New York, 42 Misc. Rep. 319, 86 N. Y. Supp. 577, affirmed in 101 App. Div. 202, 86 N. Y. Supp. 577, 92 N. Y. Supp. 1120.

West Virginia.—Pence v. Carney, 58 W. Va. 296, 112 Am. St. Rep. 963, 52 S. E. 702, 6 L. R. A., N. S., 266.

United States Supreme Court.—See Ohio Oil Co. v. Indiana, 177 U. S. 190, 20 Sup. Ct. Rep. 576, 44 L. Ed. 729; Lindsley v. Natural Carbonic etc. Co., 31 Sup. Ct. Rep. 337.

Contra.—But for recent cases *contra*, see Huber v. Merkel, 117 Wis. 355, 98 Am. St. Rep. 933, 94 N. W. 354, 62 L. R. A. 589; Houston Ry. v. East, 98 Tex. 146, 107 Am. St. Rep. 620, 81 S. W. 279, 66 L. R. A. 738; Miller v. Wheeler (1909), 54 Wash. 429, 103 Pac. 641, 23 L. R. A., N. S., 1065, *dictum* (but cf. Charon v. Clark, 50 Wash. 191, 126 Am. St. Rep. 896, 96 Pac. 1040, 17 L. R. A., N. S., 647); Stoner v. Patten, 132 Ga. 178, 63 S. E. 897.

§§ *1067–1075. (Blank numbers.)*

CHAPTER 43.

CLASSIFICATION OF UNDERGROUND WATERS.

§ 1076. Classification of underground waters.

A. CONNECTED WITH A WATERCOURSE OR SOME OTHER DEFINITE BODY OF WATER.

§ 1077. Definite known underground streams.
§ 1078. The subflow of a stream.
§ 1079. Subflow is a part of the stream.
§ 1080. Separate rights in subflow.
§ 1081. Same. (Mentone Irr. Co. v. Redlands Co.)
§ 1082. Percolations tributary to watercourses.
§ 1083. Interference with a stream in the reasonable use of one's own land.

B. DIFFUSED PERCOLATING WATER UNCONNECTED WITH A STREAM.

§ 1084. Diffused ground-water.
§ 1085. Diffused ground-water in the California Coast Range valleys.
§ 1086. Same—Underground lakes or artesian belts.
§ 1087. Same—Underground reservoirs supplied by or supplying surface streams.
§ 1088. Same.
§ 1089. Artesian wells—Miscellaneous.
§ 1090. Merger of the rules governing these different classes of ground-water with each other and with the common law of riparian rights upon streams.
§§ 1091–1099. (Blank numbers.)

(3d ed.)

§ 1076. Classification of Underground Waters.—The cases that arise group themselves into underground water in or connected with some definite body of water, on the one hand, and that which percolates diffused as "ground water" without any such connection. The former may be divided into four classes, viz.: (1) Definite known underground streams; (2) The subflow of surface streams; (3) Percolations tributary to watercourses; (4) Subterranean lakes or artesian belts. Diffused percolating water, unconnected with a stream or other definite body, stands separate from these.

The significance of this classification is that when the ground-water is directly connected with the flow of a definite stream, the Western cases have usually regarded the stream rights as the prin-

cipal, and the ground water as but incident to the stream, subordinating the ground-water claimants to the stream claimants. The latest California decisions have, however, carried the new law of percolating water to an extent which seems no longer to subordinate the ground-water claims. Nevertheless, the classification still furnishes a description of the several types of cases that arise, even though there may be no longer a difference in the principles of law that are applied to them.

A. CONNECTED WITH A WATERCOURSE OR SOME OTHER DEFINITE BODY OF WATER.

(3d ed.)

§ 1077. Definite Known Underground Streams.—The first class of underground water is water flowing in a known and defined underground stream. This has always been treated on the same principles as surface streams, both under the law of appropriation and at common law.[1] They can undoubtedly be appropriated upon the same terms as surface streams.[2] A definite known and defined underground stream may be appropriated through a tunnel, and will be protected against a taking through a later tunnel by another person upon the same terms as surface streams.[3]

The landowner has the rights of a riparian owner, upon the same terms as surface streams, in streams flowing in a defined course under his ground, provided its course and channel are definitely *known* and ascertained.[4] The general principle is established that underground streams in known and defined channels are governed by the same rules as surface streams.

A line of bushes may show the presence of an underground stream,[5] but definite underground streams are few and of rare oc-

1 Hanson v. McCue, 42 Cal. 303, at 308, 10 Am. Rep. 299; Cross v. Kitts, 69 Cal. 217, 58 Am. Rep. 558, 10 Pac. 409; Lux v. Haggin, 69 Cal. 255, at 394, 10 Pac. 674; Hale v. McLea, 53 Cal. 578; Strait v. Brown, 16 Nev. 317, 40 Am. Rep. 497; Kevil v. City of Princeton (Ky. Civ. App.), 118 S. W. 363; Pomeroy on Riparian Rights, sec. 63; Farnham on Waters, p. 2084.

2 *Ibid.;* Kinney on Irrigation, sec. 298; Howard v. Perrin, 8 Ariz. 347, 76 Pac. 460.

3 Cole Silver Min. Co. v. Virginia etc. Co., 1 Saw. 470, Fed. Cas. No. 2989, 7 Morr. Min. Rep. 503. See, also, Whitmore v. Utah Fuel Co., 26 Utah, 488, 73 Pac. 764; Keeney v. Carillo, 2 N. M. 480.

4 Yarwood v. West Los Angeles etc. Co., 132 Cal. 204, 64 Pac. 275; Verdugo W. Co. v. Verdugo (1908), 155 Cal. 655, 93 Pac. 1021, per Beatty, C. J.; Taylor v. Welch, 6 Or. 198; Hale v. McLea, 53 Cal. 578; Bradford Corp. v. Ferrand (1902), 2 Ch. D. 655; Ewart v. Belfast etc., 9 L. R. Ir. 185; Tampa etc. Co. v. Cline (1896), 37 Fla. 586, 53 Am. St. Rep. 262, 20 South. 780, 33 L. R. A. 376; Pomeroy's Riparian Rights, sec. 63.

5 Hale v. McLea, 53 Cal. 578.

currence, and the presumption is against their presence in any given case.[6] Where the only water upon land "is percolating water, oozing through the soil beneath the surface in an undefined and unknown channel [the United States supreme court says], of course this excludes the idea of a river, creek or stream of running water."[7]

The question of underground streams shades into the question of subflow of surface streams, next to be considered. That is, when the surface water disappears in the dry season, there may still be a seepage down the channel that does not appear on the surface. Such a case was dealt with as a subterranean stream in one case.[8] Again, the stream may flow only in parts of its course on the surface, being carried over the drier spots by means of the subflow. Intermittent streams of this character are treated as a single stream,[9] it being presumed that the subflow carries the stream over the dry stretch.[10] Such a stream has been considered simply as an underground stream.[11]

(3d ed.)

§ 1078. The Subflow of a Stream.—The second class of underground water is water moving underground beneath a definite surface stream. It is a scientific fact that below every river-bed not absolutely impervious there is a more or less deep substratum of flow seeping with the stream through the soaked soil, the drawing off of which results in a tapping of the stream itself. The recognition of this at law as a component of a stream is due to stubborn litigation of rights on streams in the southern part of California.[12]

6 Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299; Metcalf v. Nelson, 8 S. D. 87, 59 Am. St. Rep. 746, 65 N. W. 911; Taylor v. Welch, 6 Or. 198; Pence v. Carney, 58 W. Va. 296, 112 Am. St. Rep. 963, 52 S. E. 702, 6 L. R. A., N. S., 266; Howard v. Perrin, 8 Ariz. 347, 76 Pac. 460, affirmed in 200 U. S. 71, 26 Sup. Ct. Rep. 195, 50 L. Ed. 374; Arroyo D. Co. v. Baldwin, 155 Cal. 280, 100 Pac. 874; Western etc. Co. v. Martin (1909), 110 Md. 554, 73 Atl. 267.

7 Howard v. Perrin, 200 U. S. 71, 26 Sup. Ct. Rep. 195, 50 L. Ed. 374, construing an Arizona statute.

8 Los Angeles v. Pomeroy, 124 Cal. 597, at 632, 57 Pac. 585.

9 Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585; Medano etc. Co. v. Adams, 29 Colo. 317, 68 Pac. 431; Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. Rep. 655, 51 L. Ed. 956; Huffner v. Sawday (1908), 153 Cal. 86, 94 Pac. 424; Verdugo W. Co. v. Verdugo (1908), 155 Cal. 655, 93 Pac. 1021; Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748; Hilger v. Sieben, 38 Mont. 93, 98 Pac. 881 (bed of stream dry where it leaves a canyon, but below again appearing as a spring).

10 Petterson v. Payne, 43 Colo. 184, 95 Pac. 301.

11 Yarwood v. West Los Angeles Co., 132 Cal. 204, 64 Pac. 275.

12 See Gould v. Eaton, 111 Cal. 639, 52 Am. St. Rep. 201, 44 Pac. 319; Gould v. Eaton, 117 Cal. 539, 49 Pac. 577, 38 L. R. A. 181; Barker v. Gould, 122 Cal. 240, 54 Pac. 845; Los Angeles

The subflow of a stream is thus defined in Los Angeles v. Pomeroy,[13] affirming the following charge of the trial court:[14] "If you find from the evidence that there is a bed or a river bottom filled to a considerable depth with sand, gravel or other porous material, meandering over which a stream runs on the surface, and through and in which the water moves underground, enough of it rising to the surface to supply the surface stream, and the other portions of the underground water moving with a much less velocity than the surface stream, and through a wider or larger space in and through the interstices of the porous material, but in the same general direction as the surface stream and in connection with it, and in a course and within a space reasonably well defined, the conditions being such that the existence and general direction of the body of water moving underground can be determined with reasonable accuracy, then that portion of the water thus moving underground should be considered as a part of the watercourse as well as that part which flows over the surface." And again, in Vineland Irr. Dist. v. Azusa Irr. Co.:[15] "The existence of a well-defined subsurface flow within the bed and banks of streams such as this is well recognized. Says Kinney on Irrigation, section 44: 'At certain periods of the year water flows on the surface in a well-defined course, and there is at all times what is known as the underflow. This is the broad and deep subterranean volume of water which slowly flows through the sand and gravel underlying most, if not all, the streams which traverse the country adjacent to the mountain systems of the arid region. These underground streams are probably much greater in volume in some cases than the water upon the surface, and are, as far as rights of appropriation or riparian rights are concerned, but a valuable portion of the well-defined surface stream.'" In a Colorado case[16] the court says: "Those acquainted with the arid region know that some of the

v. Pomeroy, 124 Cal. 597, 57 Pac. 585; Vineland v. Azusa etc., 126 Cal. 486, 58 Pac. 1057, 46 L. R. A. 820; McClintock v. Hudson, 141 Cal. 275, 74 Pac. 849; Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113; S. C., 151 Cal. 377, 90 Pac. 935; Anaheim W. Co. v. Fuller, 150 Cal. 327, 88 Pac. 978; Verdugo Canyon W. Co. v. Verdugo (1908), 155 Cal. 655, 93 Pac. 1021; Huffner v. Sawday (1908), 153 Cal. 86; Arroyo D. Co. v. Baldwin (1909), 155 Cal. 280, 100 Pac. 874; Mentone Co. v. Redlands Co. (1909), 155 Cal. 323, 100 Pac. 1082, 22 L. R. A., N. S., 382, 17 Ann. Cas. 1222. See, also, Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748; Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. 755.

[13] 124 Cal. 597, at 623, 57 Pac. 585.

[14] Mr. Justice Lucien Shaw, now a member of the supreme court.

[15] 126 Cal. 486, at 494, 58 Pac. 1057, 46 L. R. A. 820.

[16] Platte Valley Irr. Co. v. Buckers Irr. Co., 25 Colo. 82, 53 Pac. 334.

most important and well-defined streams become almost, and sometimes entirely, dry during a portion of the year, and that there is at all times what is known as the underflow.[17] This is the subterranean volume of water which slowly finds its way through the sand and gravel constituting the beds of the streams which traverse the country adjacent to the mountains of this section, and to which rights by appropriation may attach."[18]

The existence of a subflow is a question of fact.[19] The evidence necessary to establish it is further discussed in McClintock v. Hudson.[20] It was first recognized in California in Los Angeles v. Pomeroy,[21] the pioneer case, though it had already been repeatedly urged upon the court.[22] It has also received recognition in Colorado[23] and in Utah,[24] and in the supreme court of the United States[25] and in other States.[1] The existence of a subflow in a dry bed has been presumed.[2]

To constitute a stream "underflow" or subflow within the cases defining that term, the water must be an accumulation confined strictly to the river bottom, moving "in connection with it, and in a course within a space reasonably well defined."[3] It must be *well defined* "within the bed and banks of streams."[4] It must be confined to the sand and gravel constituting the bed of the stream itself; the moisture which lies between bedrock below the channel, and the channel itself.[5] The ground-waters found diffused under a large valley not confined to the vicinity of the channel do not properly come within the definition, though having a slow movement down the valley in the same direction as the stream. As was

17 Citing Kinney on Irrigation, sec. 44.

18 Citing *Ibid.;* McClellan v. Hurdle, 3 Colo. App. 430, 33 Pac. 280.

19 Los Angeles v. Pomeroy, 124 Cal. 597, at 632, 57 Pac. 585.

20 141 Cal. 275, 74 Pac. 849.

21 124 Cal. 597, 57 Pac. 585.

22 See Gould v. Eaton, 111 Cal. 639, 52 Am. St. Rep. 201, 44 Pac. 319; Gould v. Eaton, 117 Cal. 539, 47 Pac. 577, 38 L. R. A. 181; Barker v. Gould, 122 Cal. 240, 54 Pac. 845.

23 See Platte etc. Co. v. Buckers etc. Co., 25 Colo. 77, 53 Pac. 334; La Jara etc. Co. v. Hansen, 35 Colo. 105, 83 Pac. 644; Buckers etc. Co. v. Farmers' etc. Co., 31 Colo. 62, 72 Pac. 49; Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. Rep. 655, 51 L. Ed. 956; Petterson v. Payne, 43 Colo. 184, 95 Pac. 301.

24 Whitmore v. Utah etc. Co., 26 Utah, 488, 73 Pac. 764.

25 Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. Rep. 655, 51 L. Ed. 956.

1 *Semble,* Eastern cases cited in 30 Am. & Eng. Ency. of Law, 322, note 1. See Smith v. Duff (1909), 39 Mont. 382, 133 Am. St. Rep. 587, 102 Pac. 984. But see *contra,* Mosier v. Caldwell, 7 Nev. 363.

2 Petterson v. Payne, 43 Colo. 184, 95 Pac. 301.

3 Los Angeles v. Pomeroy, 124 Cal. 597, at 623, 57 Pac. 585.

4 Vineland Irr. Dist. v. Azusa Irr. Co., 126 Cal. 486, at 494, 58 Pac. 1057, 46 L. R. A. 820.

5 McClintock v. Hudson, 141 Cal. 280, 74 Pac. 849.

said in Katz v. Walkinshaw:[6] "It is quite manifest that this body (if it can be so styled) of percolating water cannot be called an underground watercourse to which riparian rights can attach, unless we are prepared to abolish all distinction between percolating water and the water flowing in streams with known or ascertainable banks which confine the water to definite channels. All rain-water which falls upon the hills and mountain-sides which does not flow off at once as surface water is absorbed and percolates down in the same way to the valley below. No doubt limits can be found to every such flow, as in this case. The distinction is well established, and, in some respects, different rules of law applied to the two cases. The plaintiffs. therefore, cannot establish their claims upon the theory of an underground watercourse to which they are riparian." Katz v. Walkinshaw held that such water could not be itself a stream, and it is equally clear that it cannot be considered an integral part of any surface stream moving down the same valley, if such stream were present.[7] Such broad diffusion under a wide valley comes neither within the definition of a stream nor of a stream underflow, but instead is within the class of diffused percolating water, hereafter considered.

(3d ed.)

§ 1079. **Subflow is a Part of the Stream.**—This subflow is a part of the stream, and included in rights in the stream, as an incident thereto. No rights to such water can be obtained otherwise than in the stream on the surface. "One who has no legal right to the surface flow of the stream may not, by indirection, acquire that right by a subterranean tapping and taking of it. Riparian proprietors and appropriators of the surface water still have the right to invoke the maxim, '*Aqua currit et debet currere ut currere solebat.*'"[8] In Los Angeles v. Pomeroy,[9] the court said that such subterranean water is a part of the stream and cannot be diverted. whether it would come to the surface or not. "It belongs to the stream and must flow on to the lower riparian proprietor. His

[6] 141 Cal. 116, at 139, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236.

[7] Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748; Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. 755; Miller v. Bay Cities Water Co. (1910), 157 Cal. 256, 107 Pac. 115, 27 L. R. A., N. S., 772. These cases are further considered below. While treating such water as not an immediate part of the stream, the rules of diffused percolating water were so broadened in these cases as to make the matter immaterial in the result.

[8] Montecito v. Santa Barbara, 144 Cal. 578, at 588, 77 Pac. 1113.

[9] 124 Cal. 630, 57 Pac. 585.

right to the subsurface portion of the stream is identical with his right to the surface flow, and is entitled to the same protection." [10]

Likewise, regarding prior appropriators on the surface stream as well as riparian owners.[11] In one case,[12] the court says that the waters passing through the sand and gravel constituting the bed of the stream and the lands so nearly adjacent that the only and natural outlet would be through such channel are a part of the waters of the stream. "If they are withdrawn, the result is as much of a depletion of the natural watercourse, of which they constitute a part, as though diverted from the surface. Diversion by this means cannot be permitted when the rights of others are injuriously affected, for the natural and direct sources supplying the natural streams of the State must be protected from invasion; otherwise the rights of appropriators could be destroyed."

In Kansas v. Colorado,[13] the supreme court of the United States held that the subflow is not a separate stream, nor entitled to be considered separately from the stream, saying: "It is not properly denominated a second and subsurface stream. It is rather to be regarded as merely the accumulation of water which will always be found beneath the bed of any stream whose bottom is not solid rock. Naturally, the more abundant the flow of the surface stream and the wider its channel, the more of this subsurface water there will be. If the entire volume of water passing down the surface was taken away the subsurface water would gradually dis-

[10] Accord as to riparian proprietors, McClintock v. Hudson, 141 Cal. 275, 74 Pac. 849; Verdugo W. Co. v. Verdugo, 152 Cal. 655, 93 Pac. 1021. In Huffner v. Sawday (1908), 153 Cal. 86, 94 Pac. 424, the court said: "There are long stretches of sandy bottom between the defendants' proposed works and the lands of the plaintiffs. Water flowing over the rocky bed above sinks into the sand, which must become saturated before there can be a flow over its surface. To so fill this sand requires, as a witness testifies, several weeks. The court was justified in drawing from this testimony the inference that an interruption to the flow of this water would prevent or diminish the saturation of the sandy bed underlying the stream and thereby materially postpone the time when a surface flow would come to plaintiffs' lands. Such postponement would be a clear injury to the plaintiffs, whose interest in the waters of the stream included the right to have the river bed continue to hold sufficient water to supply and support the surface stream in its natural state."

[11] Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113; S. C., 151 Cal. 377, 90 Pac. 935; Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585; Santa Barbara v. Gould, 143 Cal. 421, 77 Pac. 151; Huffner v. Sawday (1908), 153 Cal. 86, 94 Pac. 424; Howcroft v. Union etc. Co., 25 Utah, 311, 71 Pac. 487; Whitmore v. Utah etc. Co., 26 Utah, 488, 73 Pac. 764; Kansas v. Colorado, 185 U. S. 125, at 147, 22 Sup. Ct. Rep. 552, 46 L. Ed. 838; S. C., 206 U. S. 46, 27 Sup. Ct. Rep. 655, 51 L. Ed. 956.

[12] Buckers Irr. Co. v. Farmers' etc. Co., 31 Colo. 71, 72 Pac. 49.

[13] 206 U. S. 46, 27 Sup. Ct. Rep. 655, 51 L. Ed. 956.

appear. And in that way the amount of the flow in the surface channel coming from Colorado into Kansas may affect the amount of water beneath the subsurface. As subsurface water, it percolates on either side as well as moves along the course of the river, and the more abundant the subsurface water the farther it will reach in its percolations on either side as well as more distinct will be its movement down the course of the stream."

The English cases regard the question more as one of withdrawal of support than of diversion of water. In an English case,[14] it is said: "You have a right to all the water which you can draw from the different sources which may percolate underground, but that has no bearing at all on what you may do with regard to water which is in a defined channel, and which you are not to touch. If you cannot get at the underground water without touching the water in a well-defined surface channel, I think you cannot get it at all."[15] But this has been modified and restricted to cases "in which there was direct tapping of an *underground* stream flowing in a defined channel, and not merely percolating water indirectly affecting the surface stream,"[16] and as so explained the English decisions refer not to the "subflow," but to definite underground streams only.

Tapping the stream by a well or tunnel near its bank,[17] or by a ditch parallel to the stream,[18] for distant alien use off the taker's own land have been enjoined.

It was pointed out in several of the above cases that it is a difficult matter to prove just how much a well or seepage tunnel interferes with and taps a stream, since water must have seeped into the well or tunnel from all directions; but this was held to be a question of fact, to be determined in the ordinary way; and the seepage tunnel will be unlawful to the extent that it is shown to be tapping the surface stream of existing claimants in a way that would be unlawful if done on the surface.

(3d ed.)

§ 1080. **Separate Rights in Subflow.**—Since the subflow is but a part of the stream, rights can be obtained in it separately only

[14] Grand Junction Canal Co. v. Shugar, L. R. 6 Ch. App. 483, Lord Hatherley.

[15] See, also, Village of Delhi v. Youmans, 45 N. Y. 362, 6 Am. Rep. 100.

[16] English v. Metropolitan etc. Co. (1907), 1 K. B. 601.

[17] Montecito etc. Co. v. Santa Barbara, *supra;* McClintock v. Hudson, *supra;* Vineland v. Azusa etc., *supra;* Verdugo v. Verdugo, *supra.*

[18] Platte etc. Co. v. Buckers etc. Co., 25 Colo. 82, 53 Pac. 334; cf. Yarwood v. West Los Angeles Co., 132 Cal. 204, 64 Pac. 275.

where no interference is made with the rights of surface or other existing claimants on the stream.[19] But where no interference results with existing rights in the stream, diversion of the subflow by direct tunneling may give rise to a vested exclusive right by appropriation. This would not seem an appropriation of the subflow as a separate thing, but merely an appropriation of part of the stream itself in an indirect way, in case the stream is open to appropriation. In some cases a seepage tunnel on the bank of a stream on public land was upheld against later claimants as an indirect appropriation of the stream.[20] It has been held that an artificial channel may be provided to carry the surface flow to lower claimants, after which pipes may be laid in the dry bed to collect the subsurface flow still remaining there. The pipe owner will have the right to the flow thus brought to the surface when no damage results to other existing claimants.[21] This is, perhaps, an appropriation of the subflow. The case is stated at length elsewhere.[22]

The facts in the Vineland case are worth stating: The stream in question was the San Gabriel River, where it flows over government land. There were three sets of claimants to the water: First, those who had appropriated all the surface flow; then an irrigation company, who posted an appropriation notice and began work on a tunnel for developing water, and who continued the work on the tunnel later under compromise agreement with the surface owners; finally an irrigation district which began another tunnel on the opposite bank, and finished it first. The tunnel of the company was upheld against that of the district—chiefly because the surface claimants had consented to it and had not agreed to the district's tunnel; partly, also, because the company's tunnel, having been started with a notice prior to the district's tunnel was, as between the two, prior in time by relation, though completed later than the other one.[23]

The question of riparian rights in the subflow as a separate thing (being a case where one owned lands in a low bottom over the subsurface flow, but not abutting on the surface flow) has been left

19 Cases in last section, *supra*.

20 Vineland etc. Co. v. Azusa etc. Co., 126 Cal. 486, 58 Pac. 1057, 46 L. R. A. 820; Whitmore v. Utah etc. Co., 26 Utah, 488, 73 Pac. 764. Cf. Roberts v. Krafts, 141 Cal. 20, 74 Pac. 281.

21 Pomona W. Co. v. San Antonio W. Co. (1908), 152 Cal. 618, 93 Pac. 881.

22 *Supra*, secs. 38, 39.

23 The notice posted is set forth in sec. 1460 below.

open,[24] but seems to be recognized in another case. In Verdugo Canyon Water Co. v. Verdugo,[25] there was a canyon occasionally, in times of heavy rains only, carrying a continuous surface stream; at all other times the stream (and branches) flowed to a point where it disappeared, leaving a dry stretch in the canyon, below which it again appeared on the surface; an intermittent stream. In the dry stretch an underground dam was placed, collecting and diverting underground water there. Wells were also sunk outside the bed but near it, and above and below the dam, which, if pumped unchecked, will cause the stream to cease on the surface below them. The rights of the parties were much complicated by previous partition and injunction decrees and by agreements which we do not attempt here to state, and by varying droughts. It was held, first of all, that the facts presented a case of a single stream throughout, and that the subflow is a part of the stream and cannot be taken by wells in the bank or dam in the dry stretch so as to diminish surface flow to the injury of any party entitled to it, being a mere incident to the effectual preservation of surface rights, saying: "It is obvious that the continued presence in the soil, sand and gravel, composing the bed of the canyon, of a sufficient quantity of water to supply and support these surface streams in their natural state, is essential to their existence and preservation, and that the parties have as clear a right to have this quantity remain underground for that purpose as they have to the stream upon the surface. Neither party should be permitted to decrease this necessary quantity of underground water to the depletion of the surface stream and the injury of those to whom it has been assigned. This much is clear from the previous decisions of this court."[1] Next, if the proof shows a surplus underflow that can be taken without injuring the surface stream within the above rule, then rights in such surplus may be separately considered. They will not be governed by a previous partition decree mentioning only the surface stream; such apportionment of the surface stream does not *per se* carry with it a similar apportionment of such surplus subflow, which hence remained unapportioned. Rights in such surplus subflow are to be separately considered under the law of riparian rights (all

[24] In Anaheim W. Co. v. Fuller, 150 Cal. 327, 88 Pac. 970.

[25] (1908) 152 Cal. 655, 93 Pac. 1021, Shaw, J.

[1] Citing Los Angeles v. Pomeroy, 124 Cal. 621, 57 Pac. 585; McClintock v. Hudson, 141 Cal. 280, 74 Pac. 849; Cohen v. La Canada Co., 142 Cal. 439, 76 Pac. 47.

the claimants being riparian proprietors), and such surplus must be taken subject to the rules thereof, as an unapportioned part of the stream itself. No well or subsurface dam in the banks or in the dry stretch must take more than the reasonable riparian share for riparian use of the taker (saving always that the taking does not injure the surface stream where it appears below on the surface), but such share it may rightfully take. Precision in the amount of damage to the surface stream by the wells will be impossible, but if substantial at all, the court must make a definite finding upon the amount necessary to the support of the surface stream, and thereby also of the remaining surplus underflow (if any). Such surplus is then to be apportioned by taking the whole of such surplus and dividing it by fractions thereof to each claimant under the rules of riparian rights, without distinguishing particular dams or wells by which it is being accumulated.[2] This case thus recognizes riparian rights in the subflow as a separate thing, so far as there is a surplus thereof unnecessary to the support of the surface stream. The treatment would seem to be adaptable also to the law of appropriation in the case of priority in favor of wells by the side of a stream flowing over public land.

In a later case, riparian rights in the underflow were expressly recognized.[3]

The surplus taking recognized in the Verdugo case is probably, however, exceptional. In the usual case of a porous stream-bed, taking from the underflow will be presumed to diminish the surface flow and hence wrongful against existing owners. The party claiming to the contrary has the burden of proof.[4]

(3d ed.)

§ 1081. **Same—Mentone Irr. Co. v. Redlands Co.**—In Mentone Irr. Co. v. Redlands Co.,[5] certain defendants called the "ditch-owners" had a dam called the Crafton dam in a creek, diverting and using all the surface flow at that point. Subsequently plaintiff one-half mile below built a tunnel and open-cut in the bed thus left dry, collecting seepage water coming as underflow down

2 Chief Justice Beatty, in a concurring opinion, thought the dry stretch should be regarded as a distinct underground stream, without regard to the effect of the wells therein upon the surface stream, where it appears on the surface in the lower part of the canyon.

3 Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748.

4 Perry v. Calkins (Cal.), 113 Pac. 136.

5 (1909) 155 Cal. 323, 100 Pac. 1082, 22 L. R. A., N. S., 382, 17 Ann. Cas. 1222, Shaw, J.

the canyon from the dam. Still later the defendant called the "Power company" went to a point in the canyon three miles above and diverted, in agreement with the "ditch-owners," all the surface flow, together with three hundred inches of the ground-water or underflow, bringing all by a pipe-line to a power-house whose rock-lined tail-race carried it back to the stream-bed one-fourth of a mile above the Crafton dam, whence it went to supply the "ditch-owners."

The ditch-owners were not riparian owners, and plaintiff, though a riparian owner, also used the water on nonriparian land; ditch-owners and plaintiff both using it for irrigating nonriparian land.

Plaintiff ceased to get water from its works below the Crafton dam, and claimed that the loss of supply was due to the last arrangement above described. But the trial court found (and was in this upheld) that the failure was not due to, and no damage was attributable to, the upper works, because (a) the power-house was on riparian land, and had a right as riparian proprietor to use the water for generating power, even if it did interfere with plaintiff, who used the water for irrigating nonriparian land;[6] (b) plaintiff's underflow supply depended more on tributary waters along the whole course of the creek than on the underflow solely at the upper three-mile point where defendant diverted it, and these intermediate waters continued to keep the creek-bed wet its entire length, so that the same underflow passed below the Crafton dam as before; (c) the velocity of the underflow, as distinguished from its quantity, could not, by the laws of physics, be affected by the acts complained of; (d) the real cause for the underflow below the dam failing to reach plaintiff was several years of prolonged drought.[7]

[6] The opinion is not clear how far this interference might go, saying something about the possibility of the upper riparian owner being subordinated to the lower nonriparian use because the latter was prior in time.

[7] Further, in this case, the water of the creek consisted of a stream flowing on the surface in connection and contact with an underflow through the porous material composed of sand, gravel and boulders with which the channel was filled. This material was kept saturated and the underflow supplied by waters sinking into it from the surface stream. Plaintiff's supply absolutely ceased for several years, during an excessive and prolonged drought, continuing for the unprecedented period of four years, during which, even in the rainy seasons, no water flowed over the gravel-beds, whereas in ordinary years there were during a considerable portion of each rainy season, large quantities of water flowing over these gravel-beds, into which it would sink and be kept stored until the dry seasons, then to supply the plaintiff's tunnel, which had been dug under the gravel-bed of the stream. The trial court found that certain parties were entitled to take

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§ 1082. Percolations Tributary to Watercourses.—A third class of underground water similar to the subflow, but distinguishable from it, consists of percolations tributary to a watercourse instead of resting beneath it. While the subflow is a component of the stream resting beneath the bed, the tributary percolations form a component though they have not yet reached the actual channel.

On the surface a stream is traced back so far as proof shows approaching water to be tributary, such approaching water being a component part of the watercourse. The watercourse extends back into lakes, creeks, springs that are its surface source or tributaries. Further back than that the state of geological knowledge did not, until comparatively recent years, furnish proof; and consequently the law, which can never advance beyond the proof, stopped also. The spring or other surface source was regarded as the vanishing point of the watercourse, and the percolations underground were an unknown quantity, too precarious in their movements in the then state of knowledge of the subject to be taken into consideration, and such percolations were treated under the rule of ownership of the soil in which they were found, as later set forth. The leading cases were Acton v. Blundell and Chasemore v. Richards, in the former percolations tributary to springs, in the latter percolations tributary to the River Wandle. Such, also, were most of the earlier California cases dealing with percolating water.[8] In all these cases the percolations were treated as a separate matter from the spring or watercourse and subject to a different rule of ownership.[9]

But more recent scientific investigation has dispelled much of this mystery concerning the movement of underground water. It

and use "all of the flow of said Mill Creek to the extent of two thousand five hundred inches of water." The supreme court held that this finding considered alone was ambiguous, as including the underflow; but considered with other findings and evidence, was held to refer only to the surface flow, and not to affect plaintiff's tunnel rights.

[8] The first, Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299, dealt with percolations tributary to a spring; Huston v. Leach, 53 Cal. 262, dealt with those tributary to springs which were in turn tributary to a creek, and the court said that an injunction "from in any manner interfering with the waters of said springs, so as to prevent the same, or any part thereof, from flowing into Lytle Creek . . . . does not restrain him from availing himself of percolations, even though he might thereby diminish the water which would otherwise issue from the springs." Cross v. Kitts, 69 Cal. 217, 58 Am. St. Rep. 558, 10 Pac. 409, dealt with percolations tributary to a stream; likewise Gould v. Eaton, 111 Cal. 639, 44 Pac. 319.

[9] See, also, Meyer v. Tacoma etc. Co., 8 Wash. 144, 35 Pac. 601; Leonard v. Shatzer, 11 Mont. 422, 28 Pac. 457, among other cases.

is demonstrated fairly well now that there is an underground circulation near the surface (technically, the "vadose" circulation),[10] beginning with rain waters on the summit of a watershed and substantially making its way underground to lower levels until it finally reaches the sea, finding its way by percolation to a large extent into the channels of some watercourse in this downward travel. Taken too literally, this would make all percolations tributary to watercourses, but for the purpose of any individual case that inference is too remote, and the question is instead one of proximateness on the proof. If, on the proof, the percolations are shown to be tributary to the spring or watercourse in a material degree, the loss of them causing a substantial diminution of the spring or watercourse, they are now treated as a component part of the watercourse, and follow rights on the watercourse, and rights therein are not regarded as underground rights separate therefrom.[11]

It is not necessary to create any new rule of percolating water to accomplish this result; it is a question of fact, not of law. The California court has considered Katz v. Walkinshaw as providing a new rule of law to this effect. But Katz v. Walkinshaw dealt only with diffused percolating water not on the facts part of the flow, surface or subterranean, of any stream; and the result here in question has been arrived at in numerous other jurisdictions without any belief that it involved a new rule of law, but only a more extended proof of facts. For example, cases from other jurisdictions here cited, holding that percolations tributary to a stream are a part thereof, and cannot (for distant use alien to the taker's own land) be diverted from existing claimants on the stream, otherwise than the stream itself, on the surface, could.[12] In these

[10] See Posepny on Ore Deposits. The term means a circulation near the surface, to distinguish it from the deep-seated waters showing themselves in geysers, volcanoes, etc.

[11] "It is usual to speak of the extraction of this water from the ground as a development of a hitherto unused supply. But it is not yet demonstrated that the process is not in fact, for the most part, an exhaustion of the underground sources from which the surface streams and other supplies previously used have been fed and supported. In some cases this has been proven by the event. The danger of exhaustion in this way threatens surface streams as well as underground percolations and reservoirs." Shaw, J., in Katz v. Walkinshaw, 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236.

"It may be remarked that a watercourse is none the less a watercourse because it has its source in a spring fed by 'percolating' waters." McFarland, J., in Southern Pac. Co. v. Dufour, 95 Cal. 616, 30 Pac. 783, 19 L. R. A. 92.

[12] *Colorado.*—Ogilvy Irr. Co. v. Insinger, 19 Colo. App. 380, 75 Pac. 598; Clark v. Ashley, 34 Colo. 285, 82 Pac.

cases the rule has been applied that the approaching percolations feeding the stream are a part of it.[13] Nevertheless, until Katz v. Walkinshaw, most of the California cases were against this. Since that case, however, percolations tributary to a spring,[14] or a diffused movement of ground-water down the sides of the watershed toward the bed of a stream,[15] have been held a component part of the spring or stream, and as following the law of ownership on those surface bodies.[16]

588; Wilson v. Ward, 26 Colo. 39, 56 Pac. 573; Bruening v. Dorr, 23 Colo. 195, 47 Pac. 290, 35 L. R. A. 640; McClellan v. Hurdle, 3 Colo. App. 430, 33 Pac. 280. It has even been presumed in Colorado that the percolations were a part of the watercourse. Platte etc. Co. v. Buckers etc. Co., 25 Colo. 77, 53 Pac. 334.

Idaho.—Malad etc. Co. v. Campbell, 2 Idaho, 411, 18 Pac. 52; Josslyn v. Daly, 15 Idaho, 137, 96 Pac. 568.

Montana.—Smith v. Duff (1909), 39 Mont. 382, 133 Am. St. Rep. 587, 102 Pac. 984.

Nevada.—Strait v. Brown, 16 Nev. 317, 40 Am. Rep. 497.

Utah.—Herriman etc. Co. v. Butterfield etc. Co., 19 Utah, 453, 57 Pac. 537, 51 L. R. A. 930; Cole v. Richards Irr. Co., 27 Utah, 205, 101 Am. St. Rep. 962, 75 Pac. 376.

Miscellaneous.—Fleming v. Davis, 37 Tex. 173; Copper etc. Co. v. Wabash, 114 Fed. 991, 22 Morr. Min. Rep. 164; Dement Co. v. City of Walla Walla (Wash.), 107 Pac. 1038. See Justice Story's judgment in Dexter v. Providence etc. Co., Fed. Cas. No. 3864, 1 Story, 387. See Smith v. City of Brooklyn, 160 N. Y. 357, 54 N. E. 787, 45 L. R. A. 664. See, also, 17 L. R. A., N. S., 648, note.

[13] In one of the Colorado cases above cited it is said: "It is perfectly safe to say that it is a matter of no moment whether water reaches a certain point by percolation through the soil, by a subterranean channel or by an obvious surface channel. If by any of those natural methods it reaches the point and is there appropriated in accordance with law, the appropriator has a property in it which cannot be devested by the wrongful diversion by another, nor can there be any substantial diminution. To hold otherwise would be to concede superior owners of land the right to all sources of supply that go to create a stream, regardless of the rights of those who previously acquired the right to the use of the waters from the stream below." McClellan v. Hurdle, 3 Colo. App. 430, 33 Pac. 280. In one of the Idaho cases above cited it is said: "If these springs are in the gulch or valley through which Seaman's Creek flows, and toward which their waters would naturally percolate and flow, then they must be in a sense and measure tributary to the stream; and the only further question that can arise is as to the amount of water that could reach the main stream from these springs or sources of supply. . . . . " And the burden is on the taker to show the contrary. Josslyn v. Daly, 15 Idaho, 137, 96 Pac. 568. In Kansas it is provided by statute: "No person shall be permitted to take or appropriate the waters of any subterranean supply which naturally discharge into any superficial stream, to the prejudice of any prior appropriator of the water of such superficial channel." Kan. Gen. Stats. 1901, sec. 3632. See the 1911 amendment, *infra*, sec. 1436.

[14] Cohen v. La Canada etc. Co., 142 Cal. 437, 76 Pac. 47.

[15] McClintock v. Hudson, 141 Cal. 275, 74 Pac. 849; Craig v. Crafton Water Co., 141 Cal. 178, 74 Pac. 762; Montecito Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113. See, also, Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748; Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. 755; Miller v. Bay Cities W. Co. (1910), 157 Cal. 256, 107 Pac. 115, 27 L. R. A., N. S., 772.

[16] Perhaps Montecito etc. Co. v. Santa Barbara is to the same effect, though the opinion did not discrimi-

In one case,[17] Mr. Justice Lorigan speaks to the same effect (though holding that the facts did not bring the case within the principle) of waters which but for their interception would have reached a stream in Snover Canyon, or which would have reached or supported springs in question in the case; waters which would follow the natural watershed of the canyon and have trended down in the canyon by way of the springs or otherwise. Saying that such waters were governed by a rule different from "developed" water that would not reach or be a part of the stream, being lost; but belonged to the spring or stream claimant to the same extent as the surface water therein.[18] In a still later case it is said again: "The doctrine of percolating waters as applied by the common law has of necessity been modified to meet the conditions existing in this State, conditions which never confronted the authors of that body of laws, and of the existence of which it is safe to say they never conceived the possibility. Not only has that doctrine been modified in Katz v. Walkinshaw, *supra,* but it has further received necessary and just modification in McClintock v. Hudson, *supra,* where, quoting from the syllabus, which correctly epitomizes the view of this court, it is said: 'Under the rule established in Katz v. Walkinshaw with respect to percolating waters, it is not lawful for one owning land bordering on a stream to excavate in his land, intercept percolating waters therein and apply it to any use other than its reasonable use upon the land from which it is taken, if he thereby diminishes the stream to the damage of others having rights therein.' "[19]

(3d ed.)

§ 1083. Interference With a Stream, in the Reasonable Use of One's Own Land.—The result is that approaching percolations feeding a surface body of water and essential to its maintenance belong to the owners of that surface body, as in the case of the subflow, and cannot be taken from them otherwise than in the rea-

nate closely between tributary percolations approaching the stream and the subflow resting beneath it.

[17] Cohen v. La Canada Water Co., 151 Cal. 680, 91 Pac. 584, 11 L. R. A., N. S., 752.

[18] In an early case in California this result was reached in Hale v. McLea, 53 Cal. 578. The case was treated as though a surface stream was involved, and the diversion of the percolations held unlawful. And in Southern Pac. Co. v. Dufour, 95 Cal. 616, 30 Pac. 783, 19 L. R. A. 92, Mr. Justice McFarland (dissenting) said: "It may be remarked that a watercourse is none the less a watercourse because it has its source in a spring fed by 'percolating' waters."

[19] Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. 755.

sonable use of one's own land where the underground water is thus taken.

In the reasonable use of one's own land any diminution of the stream is *damnum absque injuria*. Under the California law this is true even as to a taking on the surface, since the law of riparian rights so provides, with the exception of exclusive appropriations made while the land was public; and in Hudson v. Dailey[20] this was held to be likewise the rule where the well-owner's land, for the reasonable use of which the well was dug, did not actually abut upon the stream, so as to be riparian land. The stream may be diminished, it is there held, by a well for the reasonable use of one's own land, though that land be nonriparian to the stream, and though the well use were long subsequent in time to the opponent's stream use.

An exception is made in regard to the pueblo right of the city of Los Angeles to the Los Angeles River in the San Fernando Valley. Because of that peculiar right, landowners in the valley were excluded from use on their lands by wells, because by so doing they diminished the stream.[21] But this was recognized as an exception; the spirit of the late decisions is strong that (with that pueblo exception and possibly the exception of grant or prescription) no stream right will be paramount to the reasonable use of his own land by a landowner having wells in the valley, though the wells be later in time and diminish the stream by a draft on the underflow or the tributary percolations.[22] The underground takings which have been held wrongful were all for alien use disconnected with the land on which taken.

B. DIFFUSED PERCOLATING WATER UNCONNECTED WITH A STREAM.

(3d ed.)

§ 1084. **Diffused Ground-water.**—Cases involving diffused percolating water unconnected with any stream are a distinct type, and much the widest in their occurrence in nature. The widest class of underground water is water percolating underground, diffused, and not proximately a part of the flow in any definite channel, nor of any definite collection of water at all.

20 156 Cal. 617, 105 Pac. 748 (stated at length, *supra*, sec. 1055).

21 Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. 755 (stated at length, *supra*, sec. 1056).

22 See especially Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748; Miller v. Bay Cities W. Co. (1910), 157 Cal. 256, 107 Pac. 115, 27 L. R. A., N. S., 772.

It is said [23] that percolating water is a phrase of well-defined meaning within the law, adding: "It is essential to the nature of percolating waters that they do not form part of the body or flow, surface or subterranean, of any stream. They may either be rain-waters which are slowly filtering through the soil, or they may be waters seeping through the banks or bed of a stream which have so far left the bed and the other waters as to have lost their character as part of the flow." In a later case it is said that percolating waters in their common-law sense are vagrant, wandering drops, moving by gravity in any and every direction along the line of least resistance.[24]

The occurrence and movement of ground-water is thus described by a geological authority: "As is well known, a portion of the atmospheric precipitate sinks, through open fissures or through the pores of permeable masses, into the rocks, and fills them up to a certain level. When in a given terrain, by wells or other openings, the ground-water (that is, the water level, Grundwasserspiegel, nappe d'eau) has been reached at several points, it is found that these points are in a gently inclined plane, dipping toward the deepest point of the surface of the region, or toward a point where an impermeable rock outcrops. The ground-water is not stagnant, but moves, though with relative slowness, according to the difference in height and the size of the interstitial spaces, down the plane mentioned, and finds its way, in the first instance, directly into the nearest surface stream, or, in the second instance, forms a spring, which takes indirectly a similar course. Thus stated, free from all complications, the phenomenon exhibits clearly the law of circulation. The atmospheric moisture evidently descends; and even the movement of the upper layer of the ground-water is only apparently lateral, but really downward, and is determined (for equal sectional areas of the rock interstices) by the difference in height between the water-level and the surface outlet. For that part of the subterranean circulation, bounded by the water level, and called the vadose or shallow underground circulation, the law of a descending movement holds good in all cases, even in those complicated ones

[23] Mr. Justice Henshaw in Vineland etc. Co. v. Azusa etc. Co., 126 Cal. 486, 58 Pac. 1057, 46 L. R. A. 820.

[24] Los Angeles v. Hunter (1909), 156 Cal. 603, 105 Pac. 755. See, also, Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748; Erickson v. Crookston etc. Co., 105 Minn. 182, 117 N. W. 435, 17 L. R. A., N. S., 650; and see the long note in 67 Am. St. Rep. 663.

which show ascending currents in parts. The total difference in altitude between the water level and the surface outlet is always the controlling factor."[1]

This is a wide class of water popularly called "ground-water." It bears the same relation to water connected with a watercourse as does diffused surface water collected in pools or hollows after rains. Eventually the substantial part of such water will find its way into some watercourse, drawn by the force of gravity to the drainage bottom of the region; and where such course to a stream is susceptible of actual proof to a material degree, the water is, as discussed in the preceding sections, regarded as a part of the stream; but usually the movement to a stream drainage is too remote to found such a connection, and then the percolating water is considered by itself, under principles of its own. It is a matter of much importance. In India, for example, it has been said by Professor Mead, more land is irrigated from wells than is irrigated in the United States to-day from streams.

(3d ed.)

§ 1085. Diffused Ground-water in the California Coast Range Valleys.—A number of the more important recent California cases have arisen in typical California Coast Range valleys, and the opinions consequently make a prominent feature of the "underground reservoir" or "basin" structure usually found in those valleys; so that a word may be proper upon the general geological structure of this State.

From north to south the most notable feature of the State is the Sierra Range on the East, which is in fact the boundary of the "Great Basin" region of Nevada and Utah, and the Sierra

[1] Posepny on The Genesis of Ore Deposits, pp. 18, 19. It is said by the State Engineer of New Mexico that water travels through the soil very slowly, the rate being one to one and one-half miles per annum, and that water carried several miles from a river by a canal and applied to land often requires several years to reach the main stream again. Further: "Much of the water that sinks may form sources of artesian supply, but a great deal of it is undoubtedly lost. The principal artesian basin is mainly embraced in the Pecos Valley between Roswell and Carlsbad, where thousands of acres are irrigated from artesian wells. These wells hold out remarkably well, but as the number is increased the pressure is gradually diminishing, though during the non-irrigating season it again increases. In the artesian district reports of supervisors show that there were three hundred and twenty-three wells in the early part of 1905, but by the middle of 1907 the number had increased to nearly five hundred, nearly all of which had a good flow." Bulletin 215, Office of Experiment Stations, United States Department of Agriculture.

Range is typically a "basin range" of monoclinal uplift—a great block tilted upward, very steep on the Nevada side, but with a gradual slope on the Pacific side. It is, geologically speaking, of comparatively recent origin, with the characteristic valleys of new uplifts—that is, narrow and deep valleys cut by the streams, which flow very close to bedrock. The valleys are thus the result of cutting out, or erosion. The Sierra streams, because of much velocity and fall, carry away the detritus from the mountain sides about as fast as it falls, so that there is little accumulation of material in the valley bottoms.

On the other (or Western) side of the State, at the Pacific shore, is a much older range known as the Coast Range. Between the ridges of this range lie many broad flat valleys, ten to twenty or more miles in width, and generally several times longer in their north-south line. These are not erosion valleys caused by cutting out, but are "structural" valleys caused by filling in of the troughs between the parallel ridges which make up the range. They are not valleys which, like the Sierra valleys, streams have cut out for themselves, but are depressions in the original mountain structure (hence "structural" and not "erosion" valleys), which depressions have in time been *filled in*.[2]

This filling of the Coast Range depressions received contributions from many sources. The entire range in course of time had many changes in elevation. The valleys at the present day are not much above the level of the sea, but sometimes in the past they were under the sea, where the material carried down from the land accumulated in uniform layers; sometimes high above the sea so that rivers cut into the bordering hills and carried much coarse matter to the depressions, scouring them irregularly; sometimes covered by large inland lakes into which the hill washings fell and were more or less evenly distributed. The result is that the present valley surfaces are broad and flat, their surface many thousand feet in the center above the bedrock; and down to bedrock (the bottom of the structural depressions) extends an irregular mass of water-washed material—

2 The southern ranges, the San Bernardino Mountains, are a continuance of the Coast Range, which, about Santa Barbara County, changes its course from a north-south to a southeasterly direction. The Sierra Range crosses the San Bernardino and continues south, forming the Peninsula of Lower California, which is the tip of the Sierra Range.

sand, gravel, clay, fossilized trees, boulders and a general loose unconsolidated accumulation.

This structure is very pervious to water. It holds a large quantity of it in saturation, receiving the water as rain on the valley surface, also as run-off from the bordering hillsides, and also as seepage from streams which to-day come down these hills and pass over the valleys. Sometimes layers of clay will separate layers of gravel, or will cut off gravel layers at one end, holding the ground-water within that gravel stratum under pressure, or artesian; though usually the clay and gravel are, as above stated, in lenticular shape and irregularly placed and not artesian.

Occasionally the bordering hills furnish an opening where the bedrock which bounds the valley sides does not quite come to the elevation of the valley surface, and here the accumulated ground-water will flow over at the surface and drain away in the shape of a surface stream; and occasionally, as in the upper Santa Clara Valley, there will flow a surface stream through the entire valley length to this outlet, where both surface and underground water unite into a single flow from the basin.

(3d ed.)

§ 1086. Same—Underground Lakes or Artesian Belts.—It is this Coast Range structure to which the recent California cases give much prominence as "underground reservoirs," "underground lakes" and "underground basins." As already said, it is not typical of the Eastern or Sierra part of the State, while the central part of the State, composed of the great interior valley drained by the Sacramento and San Joaquin Rivers (a similar structural filling in the one great depression between the Sierra and Coast Ranges) is too immense to come, as an underground reservoir, into such a description. The "reservoir" structure is typical only of the Coast Region.

There are statements in the new California opinions which seem to say that the new law is intended to apply only to these "underground reservoirs." This would limit the new law to cases of these "inter-ridge" valleys, and leave it inapplicable outside of the Coast Range and San Bernardino Range regions; and even inapplicable there also, in cases of percolating water upon the hillsides, where it also is present. It would possibly also bring

the new cases within the class of a definite collection of water already considered, as another variation.

Katz v. Walkinshaw, upon its facts, dealt with such a case, where there was an underground catchment basin composed of pebbles, loose and porous material, in which the water was proved to have gathered as in an underground reservoir.[3] This same point is again noticed in a later case.[4] "In Katz v. Walkinshaw the condition presented was that of a well-defined underground catchment basin, a subterranean lake, so to speak, loosely filled with gravels." There was an artesian belt, from which the wells overflowed on the surface. The existence of a similar reservoir was previously recognized in Los Angeles v. Pomeroy,[5] where it is described as follows: "The land is found to be saturated with water to within a few feet of the surface. It is proposed to construct a subsurface dam at the lower end of the tract. A subsurface dam, of course, would not have the effect of flooding the surface permanently, but it would permanently raise the place of saturation. This being done, it is next proposed to tap this heavily saturated bed of sand and gravel by means of a tunnel connected with lateral galleries through which the water will be drained off and conducted to supply the pipes. In other words, the land is to be used as a reservoir, such as essentially it is, and none the less so because the water does not rise and stand above the surface. The evidence in the case shows that from one-fifth to one-third of the entire bulk of the material filling the valley below the plane of saturation is water. The land in its natural state, therefore, is a reservoir, and a subsurface dam is to be constructed in order to make it better serve the purposes of a reservoir." And held that such a reservoir was a well-defined entity that could be taken as a whole in eminent domain proceedings. There is a statement in Katz v. Walkinshaw that rights in percolating water will be limited to waters of that description only, saying:[6]

"The geological history and formation of the country is peculiar. Deep borings have shown that almost all of the valleys and other places where water is found abundantly in per-

[3] Katz v. Walkinshaw, 141 Cal. at page 126, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236.

[4] Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, at 584, 77 Pac. 1113.

[5] 124 Cal. 597, at page 616, 57 Pac. 585.

[6] At page 126.

colation were formerly deep canyons or basins, at the bottoms of which anciently there were surface streams or lakes. Gravel, boulders, and occasionally pieces of driftwood have been found near the coast far below tide level, showing that these sunken stream-beds were once high enough to discharge water by gravity into the sea. These valleys and basins are bordered by high mountains, upon which there falls the more abundant rain. The deep canyons or basins in course of ages have become filled with the washings from the mountains, largely composed of sand and gravel, and into this porous material the water now running down from the mountains rapidly sinks and slowly moves through the lands by the process usually termed percolation, forming what are practically underground reservoirs. It is the water thus held or stored that is now being taken to eke out the supply from the natural streams. In almost every instance of a water supply from the so-called percolating water, the location of the well or tunnel by which it is collected is in one of these ancient canyons or lake basins. Outside of these there is no percolating water in sufficient quantity to be of much importance in the development of the country or of sufficient value to cause serious litigation."[7]

In a still later case the analogy to a lake was expressly made one ground of decision, and it was expressly said: "The lands of these defendants, embracing in all about five thousand acres, are situated in the southeastern portion of the San Fernando Valley, where the surrounding mountains draw together and form what is called the 'Narrows.' A description of the San Fernando Valley, adequate for all the purposes of this consideration will be found in City of Los Angeles v. Pomeroy et al.[8] The cases of

[7] For a case where an artesian belt or underground reservoir existed, as in Katz v. Walkinshaw, see Erickson v. Crookston etc. Co., 100 Minn. 481, 111 N. W. 391, 8 L. R. A., N. S., 1250; S. C., 105 Minn. 182, 117 N. W. 435, 17 L. R. A., N. S., 650; Pence v. Carney, 58 W. Va. 296, 112 Am. St. Rep. 963, 52 S. E. 702, 6 L. R. A., N. S., 266; Barclay v. Abraham, 121 Iowa, 619, 100 Am. St. Rep. 365, 96 N. W. 1080, 64 L. R. A. 255, *semble;* Newport v. Temescal W. Co., 149 Cal. 531, 87 Pac. 372, 6 L. R. A., N. S., 1098; Burr v. Maclay R. Co., 154 Cal. 428, 98 Pac. 260; Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. 755; Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748; Barton v. Riverside W. Co., 155 Cal. 509, 101 Pac. 790, 23 L. R. A., N. S., 331; Miller v. Bay Cities W. Co. (1910), 157 Cal. 256, 107 Pac. 115, 27 L. R. A., N. S., 772.

[8] 124 Cal. 597, 57 Pac. 585.

Katz v. Walkinshaw,[9] and McClintock v. Hudson,[10] together with the Pomeroy case above cited, give so full and satisfactory an account of the water conditions existing, not alone generally in the arid portions of this State, but particularly of the conditions existing and controlling the considerations of the questions here presented, that a reference to them renders unnecessary any detailed description." [11]

If that is the result, the rule of Katz v. Walkinshaw would be merely the recognition of subterranean bodies similar to lakes or ponds, and merely an extension of the principle on which definite underground streams have long been recognized. It would be far from establishing a new rule applying to percolating ground-water in general, and would not be applicable to the entire State; nor, to a considerable extent, would it be applicable outside of California. But the court, in deciding cases concerning percolations tributary to watercourses, has held the rule of Katz v. Walkinshaw applicable, though no definite underground reservoir or artesian belt was shown, saying: It is not necessary for the plaintiff "to show the particular subterranean conditions which were disturbed," [12] and Mr. Justice Temple's opinion in Katz v. Walkinshaw makes no reference to the point, and another recent case [13] ignored it in a case where mere diffused percolating water unconnected with a stream or other collection was held to be alone involved, as do likewise the Eastern cases already cited laying down the new rule of percolating water and often citing Katz v. Walkinshaw in support of their ruling, though no underground reservoir was involved. We conclude that the existence of an artesian belt, catchment basin, underground reservoir, or *quasi*-subterranean lake does not distinguish a case from one of merely diffused percolating water, and that the court, in its new law, has adopted certain general principles irrespective of the geological formation in which the ground-water occurs.

[9] 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236.

[10] 141 Cal. 275, 74 Pac. 849.

[11] Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. 755, stated at length, *supra*, sec. 1056.

[12] Cohen v. La Canada Water Co., 142 Cal. 437, 76 Pac. 47.

[13] Cohen v. La Canada Water Co., 151 Cal. 680, 91 Pac. 584, 11 L. R. A., N. S., 752 (second appeal).

(3d ed.)

§ 1087. Same—Underground Reservoirs Supplied by or Supplying Surface Streams.—As already said, these California Coast Range valleys frequently receive part of their ground-waters from surface streams to-day coming down from the bordering ridges, their water, on reaching the valley, wholly or in large part, sinking deep into the valley soil. Likewise, occasionally, at an outlet from the valley, or "Narrows," the ground-water "overflows" into a surface stream leaving the valley. The valley ground-water, many square miles in area, cannot be regarded as an integral part of the stream, yet in the one case it depends largely upon the incoming stream, in the other largely supplies the departing stream.

It is the new California law that such cases will be treated as one general supply, in which none can obtain an exclusive right by stream or well, nor a right to carry the water to distant lands to the detriment of local landowners, but each is entitled to a reasonable use, whether by stream or well, upon his own land alone. Not that the valley waters are regarded as a part of the stream, as in the cases of "subflow" first considered at the beginning of this chapter. The connection is too remote as a fact. But the new rule of law for percolating water is now so similar to the law of riparian rights upon streams (which is now the prevailing California law of streams) that the difference in fact becomes immaterial.

There have been three recent cases upon such facts, all of which have been more fully stated elsewhere.

In Hudson v. Dailey the situation was of the departing stream. It was held that all owners in the valley above have a right, by wells, to make a reasonable use of their own lands (though the wells diminish the stream) in conjunction with a riparian owner on the stream itself; and this even though the well-owners were not riparian to the stream.[14]

In Los Angeles v. Hunter an exception was made, already considered.[14a]

In Miller v. Bay Cities W. Co. the situation was presented of the incoming stream. It was held that all landowners in the valley below have a right, by wells, to make a reasonable use of their own lands, in conjunction with riparian owners on the stream itself, and have as much right as has a riparian owner to enjoin the diversion of the stream to distant lands to the loss of their wells

[14] Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748, more fully stated *supra*, sec. 1055.

[14a] Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. 755, more fully stated *supra*, sec. 1056.

DRAINAGE OF LOS ANGELES RIVER, SHOWING SUBTERRANEAN RESERVOIR.

[Relief map filed in the case of Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. 755.]

receiving its underground diffused supply, and this though the well lands were not riparian to the stream.[15] This is the only decision the writer knows to this effect. Numerous cases have protected streams from draft upon them by wells,[16] but this is the first which has protected a well from a draft upon it by diversion of a stream.[17]

(3d ed.)

§ 1088. **Same.**—The Bay Cities case, decided independently upon principle, carries the spirit of the common law of riparian rights to a far-reaching length. Not only must a stream remain in its natural situation for use of riparian owners, but now, under this decision, a taking of the stream to distant land may be enjoined even by a nonriparian owner whose *well* would be injuriously affected by the diversion. The considerations it raises are the same as those surrounding the discussion over riparian rights. Against it may be urged all that has been said against the riparian doctrine of preserving streams in their natural channels.[18] Under it, few streams in gravel regions, other than public domain, can be lawfully diverted to distant lands; so that, to supply a well for a few acres (even nonriparian to the stream), streams would be tied up which, by surface use, are capable of supplying far greater nonriparian areas. In unsettled or sparsely settled regions much force lies in that argument. But such regions will be usually public land, where the California law has always made an exception from the rule of riparian rights. With still more force, in *settled* regions, where a large community is already dependent upon its wells, this decision has in support of it the gen-

15 Miller v. Bay Cities W. Co. (1910), 157 Cal. 256, 107 Pac. 115, 27 L. R. A., N. S., 772; *supra*, sec. 1057.

16 *Supra*, sec. 1078 et seq.

17 There is an early Washington case very similar upon its facts, and contrary in its holding. In Meyer v. Tacoma L. & W. Co., 8 Wash. 144, 35 Pac. 601, a stream flowed through a valley to a lake and plaintiff was riparian proprietor at the outlet of the stream on the lake. Defendant diverted the stream during the dry season, during which the surface flow never reaches the lake at all. Plaintiff claimed this to be a wrong to him because it deprived him of percolations which, when the stream was not diverted, spread through the dry stretch *under the whole valley* (not merely under the channel as subflow) and enriched the lake. Held, plaintiff had no cause of action (action was for damages), because the whole watershed cannot be treated as the bed of a stream, though there was an impervious bed covered with water-bearing gravels throughout. (But see Dement Co. v. City of Walla Walla (Wash.), 107 Pac. 1038.) See likewise Hilger v. Sieben (1909), 38 Mont. 93, 98 Pac. 881, denying any stream right as flowing from natural subirrigation from the stream.

18 *Supra*, secs. 112, 168.

eral "community principle," which underlies the law of riparian rights,—that of equal rights for the whole community with exclusive rights for none, nor any right in one except for the use of his own land on which the water is taken.[19]

While these cases, as already said, contained the element of "underground reservoir," yet, as also said in that regard, we do not believe the geological structure an essential matter. The rules involved appear to be general wherever there is a common and interdependent natural supply, whatever its origin.

(3d ed.)

§ 1089. **Artesian Wells—Miscellaneous.**—In Kansas there is a statute (elsewhere quoted) providing that subterranean water standing in subterranean sheets or lakes may be appropriated, as well as subterranean streams.[20] Concerning definite artesian basins, South Dakota also has an extensive statutory system governing rights therein.[21] Colorado has a statute appointing a board of officers to supervise well-boring on the plains.[22] In California there are statutes governing use of water from artesian wells so as to prevent waste.[23] Concerning the statute of 1907 to this effect it has been held:[24] "This act, therefore, relates to waters, the right to the use of which is common to a large portion of the community, and affects the general public right. Legislation in relation thereto affects the public welfare, and the right to legislate in regard to its use and conservation is referable to the police power of the State."[25] A Nevada statute provided a bounty for those who sank artesian wells.[1] A Utah statute provides for experiments in well-boring.[2]

Artesian water is distinguished from ordinary percolating water in being located in well-defined pervious strata (such as gravel-beds) lying between, or under, impervious strata, and being under pressure. Artesian wells, properly so called, are such that when the impervious cap-layer is pierced, the pressure under which

19 See *supra*, secs. 310, 776.

20 Quoted *infra*, sec. 1436.

21 S. D. Rev. Codes, 1905, sec. 2680 et seq.

22 Laws 1870, p. 11.

23 See California statutes, *infra*. Amended Stats. 1909, c. 427.

24 Ex parte Elam, 6 Cal. App. 233, 91 Pac. 811. See, also, *infra*, sec. 1142.

25 For a decision holding such a statute unconstitutional on the ground of the English rule of percolating water, see Huber v. Merkel, 117 Wis. 355, 98 Am. St. Rep. 933, 94 N. W. 354, 62 L. R. A. 589.

1 State ex rel. Blossom v. Horton, 21 Nev. 300, 30 Pac. 876; Stats. 1887, amended March 7, 1889.

2 Utah Stats. 1911, c. 65, p. 89.

the water is held forces it through the well to the surface, so that it flows on the surface.[3] However, the word "artesian" is sometimes used in reference to underground water which, by reason of pressure, will rise above its original level, though not to the surface of the ground, when the stratum in which it lies is pierced by a well.[4]

Where there are several grants to different persons of rights to take specific amounts of water from an artesian well, the ordinary rules as to grants apply, and each grantee, taking with notice of the estates held by the prior grantees, holds subject to such estates.[5]

(3d ed.)

§ 1090. **Merger of the Rules Governing These Different Classes of Ground-water With Each Other, and With the Common Law of Riparian Rights upon Streams.**—While the foregoing chapter shows the principal different types of cases that arise, yet under the new California cases just considered it now seems of minor importance what the geological form is which a given natural water supply takes.

The underlying principles are now general in California for water supplies of whatever natural form—surface or subterranean, stream or diffused; namely, the principles underlying the common law of riparian rights. Each landowner has the right to the use of his own land by means of the water supply nature has given it, whatever the origin of that supply; the water supply of a region is a common benefit for the use of all lands having access to it in natural situation. No one will be allowed to make a use of the supply, though upon his own lands, which would be unreasonable or excessive toward other landowners now or in the future in the use of their lands having natural access to some other part of the same supply; nor may one make any use of the water *off* his own land to the detriment of the other lands adjacent to the common supply, and there can be no question of reasonableness in cases of such alien use. A natural water supply, whether stream alone, or diffused percolating water alone, or both combined, is a common

[3] See 2 Am. & Eng. Ency. of Law, 944. In the California Statute of 1907, p. 122, it is provided (sec. 2): "For the purposes of this act, an artesian well is defined to be any artificial hole made in the ground through which water naturally flows from subterranean sources to the surface of the ground for any length of time."

[4] Burr v. Maclay R. Co., 154 Cal. 428, 98 Pac. 260.

[5] Charon v. Clark, 50 Wash. 191, 126 Am. St. Rep. 896, 96 Pac. 1040, 17 L. R. A., N. S., 647.

benefit for all land contiguous to and having natural access to any part of it, in which each landowner is entitled to a reasonable use of his own land in conjunction with equal use by all, and beyond that, can have no permanent right whatever.[6]

It is to these general principles that the following chapters are more particularly devoted.

[6] Except by grant, condemnation, or prescription, and except the pueblo right of the city of Los Angeles, and *possibly*, excepting exclusive appropriations from the supply while yet on public land.

§§ *1091–1099. (Blank numbers.)*

CHAPTER 44.

NATURE OF THE RIGHT IN UNDERGROUND WATER.

§ 1100. No longer private property in its natural state.
§ 1101. Usufructuary.
§ 1102. Confined, by the necessity of access, to adjacent landowners.
§ 1103. Natural right, and part and parcel of adjacent land.
§ 1104. Analogy to the common-law riparian right.
§ 1105. Same.
§ 1106. New rule compared to the law of prior appropriation.
§ 1107. Same.
§ 1108. Same.
§§ 1109–1117. (Blank numbers.)

(3d ed.)

§ 1100. No Longer Private Property in Its Natural State.—Under the new cases, percolating water, like running water, is now said, in its natural state, to belong to no one,[1] or "belongs to the public," or "at least, to that portion of the public who may own the surface of the soil,"[2] or belongs to the community,[3] or "is stored by nature for the community,"[4] as "a common supply."[5] There is little difference between this and the law as to *running water,* which the law holds to be "common," and not the subject of individual ownership while in its natural condition.[6]

This is a complete departure from the *cujus est solum* doctrine, which, as already discussed,[7] regarded the percolating water as, in its natural state, the absolute private property of the landowner as a corporeal part of his land, like the soil and trees.[8]

1 Ohio Oil Co. v. Indiana, 177 U. S. 190, 20 Sup. Ct. Rep. 576, 44 L. Ed. 729.

2 Ex parte Elam, 6 Cal. App. 233, 91 Pac. 811.

3 Temple, J., in Katz v. Walkinshaw, 141 Cal. 116, at 140, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236.

4 Barclay v. Abraham, 121 Iowa, 619, 100 Am. St. Rep. 365, 96 N. E. 1080, 64 L. R. A. 255.

5 Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748. See, also, Miller v. Bay Cities W. Co. (1910), 157 Cal. 256, 107 Pac. 115, 27 L. R. A., N. S., 772.

6 *Supra,* sec. 2 et seq. The *State* does not own the water as proprietor. If the attorney general sues, it is on behalf of the overlying community; not on behalf of the State. People v. N. Y. Carbonic etc. Co., 196 N. Y. 421, 90 N. E. 441, per Cullen, C. J.

7 *Supra,* secs. 34, 1040.

8 It may be noted that the California code, in adopting the "*cujus est solum*" maxim, did so in terms which would not include percolating water. Section 659 of the California Civil Code provides: "Land is the *solid* material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance." Percolating water is not a solid.

Likewise it is now said, as is the settled law of *running water,* that percolating water as a substance or *corpus* can become private property only when some individual actually takes a portion of it into possession by a well or similar artificial structure. In an opinion in the Supreme Court of the United States,[9] more fully considered in another place,[10] percolating water is called a "mineral *ferae naturae,*" which can no longer be said to be the property of the landowner merely because it is in his land, nor the property of anyone at all until taken into possession in a well or other artificial structure reducing it to possession.[11] So it is said that until reduced to possession it remains nobody's property.[12]

(3d ed.)

§ 1101. **Usufructuary.**—The right of the individual is to reduce the water to possession for the use of his land. "Such rights are usufructuary only," said Mr. Justice Shaw.[13] In contending for the rule of reasonable use in Chasemore v. Richards,[14] Lord Wensleydale took this position: "And if this be true," he said, "with regard to underground streams finding their way into the river, then comes the difficulty how to distinguish the smaller rivulet, and the drops of water which flow and percolate into and supply the river. They are equally the gifts of nature for the benefit of the proprietors of the soil through and into which they flow. They are all flowing water, the property in which is not vested in the owner of the soil, any more than the property in the water of a river which flows through it on the surface. . . . . The reason why it is, as such, more the subject of property than the water flowing above ground, is not explained. Surely the *use* of the flowing water in each case, and not the property in it, belongs to the proprietor of the surface."

(3d ed.)

§ 1102. **Confined, by the Necessity of Access, to Adjacent Landowners.**—While, under the new law, percolating water, like

9 Ohio Oil Co. v. Indiana, 177 U. S. 190, 20 Sup. Ct. Rep. 576, 44 L. Ed. 729.

10 *Supra,* sec. 34.

11 This is the settled rule in Indiana with regard to natural gas and oil. *Ibid.*

12 *Ibid.;* Barclay v. Abraham, 121 Iowa, 619, 100 Am. St. Rep. 365, 96 N. W. 1080, 64 L. R. A. 255; Ex parte Elam, 6 Cal. App. 233, 91 Pac. 811.

13 Katz v. Walkinshaw, 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236. See, also, Burr v. Maclay R. Co., 154 Cal. 428, 98 Pac. 260; Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748.

14 7 H. L. Cas. 349, 11 Eng. Reprint, 140.

running water, is the property of no individual in its natural state, but is, until reduced to possession, in the "negative community" or "common" or "public," yet there comes in the same necessary classification of the public in regard to its enjoyment, or usufruct, arising out of the natural situation of the water in a position where some of the public have no access to it. While the water itself is not anyone's property, yet the land which bounds or overlies it is. Those of the public not owning any such land, having no right to trespass upon the inclosing or overlying lands, have no access to the water—no means of availing themselves of its presence; they are excluded by the facts of natural situation of the water with respect to the land. Only such of the public as have access to the water in its natural situation—that is, only the adjacent or overlying landowners—have the right of enjoyment.

The right of use is confined to the lands of "that portion of the public who may own the surface soil."[15] The overlying landowners alone have this right because they "have equal *access* to the same supply";[16] that is, the right arises from "the natural advantages of situation."[17] This ground is clearly expressed in Hudson v. Dailey,[18] saying: "*All parties having access to it* would have the right to share reasonably in its use"; and further, "This right arises from the fact that the water is then in his land so that he may take it without trespassing upon his neighbor," and such waters "should be considered a common supply, in which all who, by their natural situation, have *access* to it, have a common right, and of which each may make a reasonable use upon the land so situated," etc.

This we have elsewhere set forth at length as a general principle.[19]

(3d ed.)

§ 1103. Natural Right and Part and Parcel of Adjacent Land. This right of use, being one to the use of land, is perpetually reserved to the land, for future use, if not at present actually in use. Nonuse does not cause a loss of it, for it is a right to enjoy the land at any time by means of this right respecting the water, in

[15] Ex parte Elam, 6 Cal. App. 233, 91 Pac. 811.

[16] Barclay v. Abraham, 121 Iowa, 619, 100 Am. St. Rep. 365, 96 N. W. 1080, 64 L. R. A. 255.

[17] Burr v. Maclay R. Co., 154 Cal. 428, 98 Pac. 260.

[18] 156 Cal. 617, 105 Pac. 748, at 753.

[19] *Supra*, secs. 54, 225, 692.

common with all other adjacent landowners. It is hence said that this right arises from "the natural advantages of situation,"[20] and that it is a "natural right,"[21] bound up in the ownership and use of, and "part and parcel" of, the overlying land.[22] "The owner of land has a *natural right* to the reasonable use of the waters percolating therein; . . . . his ownership of the land carries with it all the natural advantages of its situation and the right to a reasonable use of the land and everything it contains, limited only by the operation of the maxim, '*Sic utere tuo ut alienum non laedas.*'"[23]

(3d ed.)

§ 1104. **Analogy to the Common-law Riparian Right.**—These fundamental features do not differ from the essentials of the riparian right at common law upon streams,[24] and it is now the express position of the California court that there is no essential difference between the new rule of underground water and the common-law rule of riparian rights on streams.

It is now said:[25] "The land being so situated that it has the natural advantages afforded by the underlying water, the conditions are analogous to those affecting land riparian to a stream, which, because of its situation with reference to the stream, is given rights to the waters thereof, so far as necessary for use thereon, which are paramount to the right of another riparian owner to divert the water to lands not riparian."[1]

So, in another recent case, where upon the facts the groundwater and a surface stream were combined in natural origin and geological occurrence, the court found it a simple matter to adjust conflicts between nonriparian well-owners and stream riparian owners, because the law in respect to both is now substantially the same. After saying that the new underground law is based upon the principle of reasonable use upon one's own land of its natural advantages of situation, the court then says: "It is upon this

[20] Burr v. Maclay R. Co., 154 Cal. 428, 98 Pac. 260.

[21] Cohen v. La Canada W. Co., 151 Cal. 680, 91 Pac. 584, 11 L. R. A., N. S., 752; Erickson v. Crookston W. Co., 105 Minn. 182, 117 N. W. 435, 17 L. R. A., N. S., 650; Hudson v. Dailey, 156 Cal. 617, 105 Pac. 755; Miller v. Bay Cities W. Co. (1910), 157 Cal. 256, 107 Pac. 115, 27 L. R. A., N. S., 772.

[22] Cases just cited.

[23] Hudson v. Dailey, *supra*. Wells have been held taxable as real estate. Cal. Domestic etc. Co. v. Los Angeles (1909), 10 Cal. App. 185, 101 Pac. 547.

[24] *Supra*, sec. 684 et seq.

[25] Mr. Justice Shaw in Burr v. Maclay R. Co., 154 Cal. 428, 98 Pac. 260.

[1] Adding that the rules of riparian rights do not, of necessity, control here, however, in *all* respects.

principle that the law of riparian rights is founded, giving to each owner the right to use the waters of the stream upon his riparian land, but limiting him to a reasonable share thereof, as against other riparian owners thereon. We think the same application of the principle should be made to the case of percolating waters feeding the stream and necessary to its continued flow. There is no rational ground for any distinction between such percolating waters and the waters in the gravels immediately beneath and directly supporting the surface flow, and no reason for applying a different rule to the two classes, with respect to such rights, if, indeed, the two classes can be distinguished at all. Such waters, together with the surface stream supplied by them should be considered a common supply, in which all who by their natural situation have access to it have a common right, and of which they may each make a reasonable use upon the land so situated, taking it either from the surface flow, or directly from the percolations beneath their lands."[2]

Again, in another case,[3] upon a like situation, it is expressly laid down at very great length that there is no difference between the essential features of the law of riparian rights on streams, and the new law of percolating water, saying, *inter alia:* "We perceive no reason why the same principle should not be applied" in both cases, or where streams and ground-water are combined in nature. "Why, in principle, should there be any distinction?" the court says, adding that the modification of the common law of percolating water which has brought it to the basis of the common law of riparian rights was done "to meet the conditions in this State necessitating it." And again, "There is no reason for any difference in the rule between the classes, and none should exist."[4]

In another case, where no stream was involved, the court dealt with cases decided upon the common law of riparian rights, as upon the same footing with the new percolating water cases.[5]

(3d ed.)

§ 1105. **Same.**—Like the riparian right, it is a right to interfere with a neighbor's land only for a fit purpose, viz., the use of

[2] Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748. See this case more fully stated *supra*, sec. 1055.

[3] Miller v. Bay Cities W. Co. (1910), 157 Cal. 256, 107 Pac. 115, 27 L. R. A., N. S., 772.

[4] See this case more fully stated, *supra*, sec. 1057.

[5] Cohen v. La Canada W. Co., 151 Cal. 680, 91 Pac. 584, 11 L. R. A., N. S., 752. See, also, Bonetti v. Ruiz (Cal. App.), 113 Pac. 118.

one's own land, and that only to a reasonable degree, to be decided on the facts of each case; and, like the riparian right, it survives nonuse. In this, the most attacked feature of the law of riparian rights hitherto in the West, it is most significant that the court adopted it as a wholly original matter, acting solely with a view to the public good.

Perhaps the new percolating water rule seems to differ from what Lux v. Haggin, regarding riparian rights on streams, speaks of as "*what has been said to be* the rule of the common law,"[6] in that distant use may, as to percolating water, be made of any amount over that which "is or may be beneficial to the land" of the complaining owner (until a sufficient number of owners join in complaint to show that there is no surplus over their collective susceptibilities of enjoyment); and nonuse of percolating water may be protected only by declaratory decree and not by prohibitive injunction.[7] If this be different from the law of riparian rights on streams, then herein the new rule differs therefrom, whence it is sometimes said that the new rule is not identical with the law of riparian rights on streams.[8] But, as already discussed at much length, there is much ground for considering these principles to be in consonance with a proper analysis of the common law of riparian rights also.[9]

(3d ed.)

§ 1106. **New Rule Compared to the Law of Prior Appropriation.**—It is settled now by the decisions in Burr v. Maclay R. Co., Hudson v. Dailey and Miller v. Bay Cities Co.[10] that the law of exclusive right by prior use or occupancy (the law of prior appropriation) does not apply. As laid down in these cases, the rule now is that all persons having land over an underground supply of percolating water have by nature certain rights to the

[6] Lux v. Haggin, 69 Cal. 255, at 310, 10 Pac. 674.

[7] Burr v. Maclay R. Co., 154 Cal. 428, 98 Pac. 260.

[8] "It is not the policy of the law to permit any of the available waters of the country to remain unused, or to allow one having the natural advantage of a situation, which gives him a legal right to water, to prevent another from using it, while he himself does not desire to do so. The established and settled law of riparian rights in running streams, which have become vested rights, may compel a different rule with regard to such waters in some instances, but these rules of law do not, of necessity, control rights in percolating waters." Burr v. Maclay R. Co., 154 Cal. 428, 98 Pac. 260. See, also, Erickson v. Crookston W. Co., 105 Minn. 182, 117 N. W. 435, 17 L. R. A., N. S., 650; Katz v. Walkinshaw, 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, Temple, J.

[9] *Supra*, sec. 827 et seq.

[10] *Supra*, secs. 1053, 1055, 1056.

use of their lands by means of the water, whether they exercise them or not, and they may begin to exercise them whenever they will. Priority in time of use will give no better right, and nonuse will affect only the remedy (refusing a prohibitive injunction and granting instead a declaratory decree declaring the right to begin use on his land whenever he will). It is hence settled that no exclusive right under the law of appropriation will be permitted, because of priority of use, to defeat the use of one's own land at any time.

As between two neighboring landowners, for use on their own lands, this is settled by Hudson v. Dailey;[11] and as against use off one's land, it appears in all the recent California cases,[12] and if any doubt existed, is settled by Miller v. Bay Cities W. Co.[13] The following passage well represents what is repeatedly said in the latter lengthy opinion: "Such landowner has a right to restrain a diversion from the stream or saturated plane or other well-defined supply, by an appropriator or anyone else who seeks to divert such stream or other supplying waters from their natural percolating flow, for use elsewhere than upon lands to which, as waters of the stream, they are riparian, or which, as waters of an underground stratum, may reasonably and usefully be applied to the overlying land."

Under the old rule no "right" at all was recognized; *a fortiori,* no exclusive or appropriative right. Thus, in Utah and other States exclusive rights in percolating water have not been recognized, though priority of appropriation is the sole law of surface streams. In the case of Sullivan v. Northern Spy Min. Co.,[14] the supreme court of Utah held that the discoverer of percolating waters on public lands, by digging a well for the purpose of collecting the same for use, acquires a right of entry and an easement in the land for the maintenance of his well, against a later entry of the land, and the right to the water as an appropriator thereof as against surface diversion by a subsequent locator of the land upon which the well is situated, but adding: "This right of an appropriator is, of course, subject to the rule of law which will permit the owner to sink an adjoining well on his own premises, although he should thereby dry up that of the first appropri-

[11] 156 Cal. 617, 105 Pac. 748.

[12] E. g., Burr v. Maclay R. Co., 154 Cal. 428, 98 Pac. 260.

[13] (1910) 157 Cal. 256, 107 Pac. 115, 27 L. R. A., N. S., 772.

[14] 11 Utah, 438, 40 Pac. 709, 30 L. R. A. 186.

ator."[15] So, also, in Kansas there was a statute providing for appropriations of ground-water, but it added that this shall not be construed "as to prohibit the proprietor of any lands from sinking wells therein, and thereby collecting the waters percolating through lands, and by means of pumps, buckets, and other appliances withdrawing the same *for beneficial uses on his own land*"; and in 1911 the appropriation section was repealed, and one substituted expressly saying, instead, that the use of the ground-water shall be appurtenant to the land where found.[16]

The spirit of the new law of percolating water, as well as the rulings under it, make directly against the law of exclusive rights by priority of appropriation.

(3d ed.)

§ 1107. **Same.**—The term "appropriation," as used by Mr. Justice Shaw,[17] refers only to the negative case that there is a surplus over the possible present or future ability of use of his land by complainant, which surplus may be taken to distant land until some other complainant, or a sufficient number of complainants, join together to oppose it. It falls against a sufficient number of complainants whose collective use would leave no surplus over their combined susceptibility of use, and hence is not an indefeasible right against the world, such as, on streams in California, can be acquired only on public land.[18] There it becomes a freehold water-right; but here the surplus taking is defeasible by a sufficient number of overlying owners joining against it. The law of appropriation as a freehold system, such as it is on streams on public land, has no place here. The word "appropriation" as used by the Justice in these opinions (especially in Katz v.

[15] To the same effect, though on public lands, Deadwood etc. Co. v. Barker, 14 S. D. 558, 86 N. W. 619; Howard v. Perrin, 8 Ariz. 347, 76 Pac. 460; S. C., 200 U. S. 71, 26 Sup. Ct. Rep. 195, 50 L. Ed. 374; Willow etc. Co. v. Michaelson, 21 Utah, 248, 81 Am. St. Rep. 687, 60 Pac. 943, 51 L. R. A. 280. In a recent Idaho case (Le Quime v. Chambers (1908), 15 Idaho, 405, 98 Pac. 415, 21 L. R. A., N. S., 76) Sullivan v. Northern etc. Co. was approved. The first edition of this book was referred to as stating (as it did) that Katz v. Walkinshaw had recognized exclusive indefeasible rights by prior appropriation in California. That had reference to the second opinion in Katz v. Walkinshaw. But the subsequent decisions have now established the contrary as above set forth; and while the term "appropriation" is sometimes used in the California opinions, it does not refer to the existence, by priority of use, of any right that will be valid against the future use by a landowner on his own land.

[16] *Infra*, sec. 1436.

[17] Katz v. Walkinshaw, Burr v. Maclay R. Co. and other cases.

[18] See *supra*, secs. 152, 227.

Walkinshaw) is used in a different sense, and is not intended to convey the meaning that exclusive rights may be obtained by anyone under the new law of percolating water.[19]

(3d ed.)

§ **1108. Same.**—A paramount right by grant, condemnation or prescription, probably absolutely excludes the grantor from digging wells, though for use of his own land, so far as said wells deplete the supply granted.

An unusual instance of such a paramount right exists in the pueblo right of Los Angeles.[20] *Quaere,* whether appropriation on public land can give such right. Priority of stream use on private land will not. Landowners may later make reasonable use of wells though interfering with prior stream use.[21] But if a true stream appropriation *on public land,* before the overlying or riparian lands were settled upon? The principles of Hudson v. Dailey would negative it even here; but of Los Angeles v. Hunter, would extend the exclusive appropriation to the percolating water, and bind the land in the hands of subsequent settlers. It is still an open question, but the whole spirit of the new law of percolating water is against allowing any exclusive right, by mere priority of use, to defeat the reasonable use of one's own land at any time.

Speaking broadly, as a general conclusion of the whole matter as concerns the law of appropriation, the new rule is that no exclusive right under the law of appropriation (whether appropriation of a stream or appropriation sought by a well) will be permitted to defeat the present or future use of one's own land; that the principle of exclusive right (the law of appropriation) is the one which (with the exception of the pueblo right of Los Angeles) gives way whenever it conflicts (which it does whenever it meets) with the principle of the unlimited use of one's own land against alien use, or the *reasonable* use of one's own land between neighboring local uses. Lux v. Haggin solved the conflict as to surface streams by confining the doctrine of appropriation to the public domain, but as to percolating water the lands likely to be involved in California are all now in private hands. As to streams on such

19 *Supra,* sec. 246, appropriation by disseisin; sec. 815 et seq., nonriparian use; sec. 831.

20 Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. 755. *Supra,* sec. 1056.

21 Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748. *Supra,* sec. 1055.

private lands, the "reasonable use" (in its correlative sense) provided by the common law of riparian rights prevails in California against exclusive appropriation to-day, and it is now clear that there is no difference between the new law of percolating water and the common law of riparian rights in this respect.

The law is that the ground-water is the property of no individual, and is instead "common" or "public," for the equal use of all adjacent lands, and with exclusive rights for none, nor any right for use off one's land to the detriment of the lands of complaining adjacent owners.[22]

22 In New Mexico, the State Engineer permit system based upon the law of prior appropriation does not apply to percolating water. Vanderwork v. Hewes (N. M.), 110 Pac. 567.

§§ *1109–1117. (Blank numbers.)*

CHAPTER 45.

USE CONFINED TO ONE'S OWN LAND ADJACENT TO THE SUPPLY.

§ 1118. Basis of the limitation to one's own land.
§ 1119. A question of fitness of purpose, viz., the benefit of one's own property, when damaging a neighbor.
§ 1120. Same—Malice distinguished.
§ 1121. The benefit of one's own property as a justification.
§ 1122. This is the chief point in the new cases.
§ 1123. Sale of water.
§ 1124. Conclusions.
§ 1125. Future development.
§§ 1126–1132. (Blank numbers.)

(3d ed.)

§ 1118. **Basis of the Limitation to One's Own Land.**—The limitation to one's own land arises, first, by the exclusion of lands not naturally adjacent to the supply, because their owners have no access of their own to the water; second, by the rule that an adjacent landowner (who has access to the supply) can excuse the damage which the taking causes to the land or the water supply of other adjacent owners equally entitled (or to the value of their land or to its future use), only on the ground of a reasonable use of his own land. Alien lands are thus first excluded because they have no access to the supply, and adjacent or overlying landowners (who have equally access to it) are then confined to use upon their own lands as the ground upon which the damage which the taking does to the other adjacent lands becomes *damnum absque injuria.* This principle, that damage caused to the land of another in reasonable use of one's own land (and there only) is *damnum absque injuria,* is likewise at the foundation of the similar limitation of use, under the common law of riparian rights, to riparian lands upon streams.[1]

(3d ed.)

§ 1119. **A Question of Fitness of Purpose, viz., the Benefit of One's Own Property, When Damaging a Neighbor.**—When we come to ask what is meant by this reasonable use which will turn

[1] *Supra,* sec. 765.

a damage *prima facie* wrongful into *damnum absque injuria*, a similar principle under the common law of riparian rights suggests itself—that of "natural uses." As seen in discussing this term there,[2] the term "natural uses" is probably based on an idea running through other branches of the common law, that there is such a thing as an ordinary, proper or natural use of one's land, and if damage follows to a neighbor in such use it is not wrongful. So, though the whole of a stream be consumed by a riparian proprietor for such "natural use," it is at common law *damnum absque injuria* because done in the natural use of the land. In Katz v. Walkinshaw,[3] Mr. Justice Temple said: "It is a general rule—in fact, a universal principle of law—that one may make reasonable use of his own property although such use results in injury to another." The statements are entirely the same in this—that the purpose of use of the party complained of is looked to in justification of a damage. The reasonableness which Mr. Justice Temple contemplates is not so much one of effect on the other—on the contrary, it is a rule by which such effect is to be to a certain degree absolutely ignored and become *damnum absque injuria* —but one of the fitness of purpose or motive of the party complained of. "Reasonableness" in this connection means a reasonable use of his own land as the purpose or motive of use by the party complained of, offered in justification of damage to a neighbor.

This is a very broad idea, and as we believe it underlies the entire common law of waters in its present form, including the common law of riparian rights, and as it is the idea upon which the new law of percolating water is declared to rest by eminent commentators,[4] we shall digress a little upon this matter.

(3d ed.)

§ 1120. **Same—Malice Distinguished.**—It is necessary, first, to lay aside certain cases. There are some decisions to the effect that the damage is always *damnum absque injuria except* when done with malice, which must be distinguished from the new rule.

2 *Supra*, sec. 740.

3 141 Cal. 116, at 143, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236.

4 Quotations from Mr. Justice Temple's opinion to this effect have already been given, and the case of Katz v. Walkinshaw is usually cited to the same effect, e. g., in 18 Harvard Law Review, 415 (article by James Barr Ames); in 13 Yale Law Journal, 222 (article by E. W. Huffcutt); Pomeroy's Equitable Remedies, sec. 563. See, also, 4 Mich. L. R. 541; 1 Columbia L. R. 506; Meeker v. East Orange, 76 N. J. L. 435, 70 Atl. 360.

Under such cases the taking causing damage is *prima facie* rightful, and the wrongful case is the exception through malice, the burden being on the complaining party to show the wrongful element (viz., malice). And hence such cases are not so much a departure from the English rule as are the recent cases, which consider the damage *prima facie* wrongful, and put upon the party complained of the burden of showing justification.

To illustrate the rule of malice, the civil law provides:[5] "*Et sane actionem non debet habere, si non animo vicino nocendi, sed suum acrum meliorem faciendi id fecit.*" Commenting on this Lord Wensleydale (Baron Parke) said in Chasemore v. Richards:[6] "The civil law deems an act, otherwise lawful in itself, illegal if done with a malicious intent of injuring a neighbor, *animo vicino nocendi.*" In the Partidas, the Spanish Codes,[7] it is said: "Law 19: When a man has a fountain or well in his house, and his neighbor wishes to make one in his house likewise, in order to procure water for his use, the latter may do it and the former cannot prevent him, notwithstanding the water in the first well, or fountain, may be thereby diminished; unless the person wishing to make the new well has no need of it, and acts maliciously."

In an early New York case: "A further exception exists in case of an injury done by cutting off such waters with malice. No person can wantonly and maliciously cut off on his own land the underground supply of a neighbor's spring or well without any purpose of usefulness to himself."[8]

This also appears in some of the California cases. Thus, in Hanson v. McCue:[9] "The question then comes to this: One who is owner of the freehold—*usque ad inferos*—digging in the soil for the lawful purpose of his own profit, and not actuated by the malicious intent to wantonly deprive the plaintiff of the flow of water, is, at the instance of the latter, enjoined from so digging, because he will thereby divert the waters which percolate the soil from the spring from which the artificial watercourse leads to the lands of the plaintiff." (Page 309.) "The defendant would have had the right to dig upon his own land for any purpose not

5 Digest, 39, 3, 1, sec. 12, Pothier's ed., 1782, vol. 3, p. 20.

6 7 H. L. Cas. 349, 11 Eng. Reprint, 140.

7 Partidas Third Title, 31, 1 Moreau and Carleton's Trans. 409, 410.

8 Delhi v. Youmans, 50 Barb. (N. Y.) 316. See, also, Greenleaf v. Francis (Mass.), 18 Pick. 117; Chesley v. King, 74 Me. 164, 43 Am. Rep. 569; Frazier v. Brown, 12 Ohio St. 294, and see, also, other early American cases in 19 L. R. A. 92, note.

9 42 Cal. 303, 10 Am. Rep. 299.

proceeding from mere malice, even though he had thereby diverted the percolations from a spring on the plaintiff's premises. If the plaintiff was the owner of the Dixon Springs, with a consequent right to the use of all its water, the defendant would have the clear right to dig upon his adjoining land, for any useful purpose, notwithstanding he might thereby divert the percolations, and thus destroy the spring. He would not be allowed to do it from mere wantonness and malice; but the owner of the soil is entitled to use the percolations through it, for any purpose which he may deem beneficial, or may divert them in another direction, in the prosecution of any work on his own land which he may consider advantageous to him. I deem it unnecessary to inquire into the reason of the ruling, which, however, is fully stated in the carefully considered case already cited, and the numerous authorities, therein referred to. I do not understand plaintiff's counsel to deny that the defendant might lawfully divert the percolations from the spring, provided it was only incidentally done in the prosecution of an independent or collateral work on his own premises; but he claims that the sole object of the tunnel is to cut off the supply of the water, and thus destroy the spring, which he insists the defendant has no right to do by a work expressly prosecuted for that especial purpose. But the findings show that the object of the tunnel is to collect the water for a commercial purpose, to wit: to furnish the neighboring village of San Rafael a supply of fresh water—and this certainly is a proper and useful purpose. If the defendant has the right to divert the percolations by digging a ditch for the mere purpose of drainage, or by sinking a well essential to the enjoyment of his property, I can perceive no reason why he may not accomplish the same result for any other purpose which he may deem advantageous to him; I think he may do it for any purpose which is not purely malicious." (Page 311.) Bartlett v. O'Connor [10] is also to this effect, saying: "And although the court in its findings did not use the word 'malice,' yet it substantially found that the defendants intentionally, unnecessarily, and without benefit to themselves or others diverted the water to the injury of the plaintiffs. This the law characterizes as a malicious injury. Conceding that defendants were entitled to drain the land for the purpose of cultivating it, yet if, without inconvenience or extra expense, they could have

[10] (Cal.) 36 Pac. 513.

adopted a mode or means of drainage not injurious to others, they had no right to adopt a mode which was not only injurious to plaintiffs, but intentionally so, as found by the court." In Southern Pacific Co. v. Dufour, Mr. Justice McFarland, dissenting, says (as is said in Hanson v. McCue) that a spring cannot be lawfully undermined and destroyed by a trench or tunnel *run for that express purpose.*[11]

(3d ed.)

§ 1121. The Benefit of One's Own Property as a Justification.—But this rule that malice will make unlawful a damage otherwise *damnum absque injuria* has been strenuously and usually denied in the common law,[12] for the reason that "malice" would too often be no test at all but a matter of the personal leanings of the judge, and often end simply in deciding against the party complained of because the judge disliked his character. Malice, consequently, has nothing to do with the matter now in hand; it is not the ground upon which the new cases proceed. Instead, the damage *caused* by the party complained of is in all cases a *prima facie* wrong without malice or motive to make it so. It is then an entirely different question in offering a proper purpose or motive (the use and betterment of one's own land) in excuse to an action for causing such damage. A fixed external test is provided in this way which does not leave it to the personal morals of the judge. Where motive can be tested by a fixed external standard, such as whether a party is acting in the use of his own land or not, the uncertainty and undoubted dangers of having courts arbitrarily try men's motives (as in the matter of "malice") are largely overcome.

"If a man builds a mill on his own land and draws the trade from his neighbors' mills, he does his neighbor damage but not a legal injury,"[13] which is put to illustrate that *although he does harm and causes damage,* yet the act will not be wrongful, for it is lawful for anyone to do upon his own land anything which will not cause wrongful damage to his neighbor.[14] So another old au-

[11] Southern Pac. Co. v. Dufour, 95 Cal. 615, 30 Pac. 783, 19 L. R. A. 92.

[12] Allen v. Flood, [1898] App. Cas. 1; Chasemore v. Richards, 7 H. L. Cas. 349, 11 Eng. Reprint, 140; Fisher v. Feige, 137 Cal. 39, 92 Am. St. Rep. 77, 69 Pac. 618, 59 L. R. A. 333. See Skinner v. Shew (1893), 1 Ch. 422.

[13] "Si quis in fundo proprio construat aliquod molendinum, et sectam suam et aliorium vicinorum, subtrahat vicino, facit vicino damnum et non injuria." Bracton, lib. 4, fo. 221, cap. 37.

[14] See Digby's History of Real Property, 5th ed., p. 190.

thority says that an action will not lie "for a reasonable use of my right, though it be to the annoyance of another, as if a butcher, brewer, etc., use his trade in a convenient place, though it be to the annoyance of his neighbor."[15] As expressed in one case, laying down the doctrine of reasonable use, a neighbor must not be damaged in his use of percolating water "except it was done in the exercise of a legal right to improve the land, or make some use of it in connection with the enjoyment of the land itself."[16]

The idea involved in all this is that a damage inflicted upon a neighbor is *prima facie* wrongful; becoming *damnum absque injuria* when it appears that the *purpose* of the party complained of was to promote his own welfare by the use of his own property or business, and the damage resulted from a reasonable (as opposed to an excessive) attempt to effectuate that purpose; but inexcusable when not done in the use of his own land.

(3d ed.)

§ 1122. **This is the Chief Point in the New Cases.**—The great body of the new cases consists in applying this principle, and limiting a landowner to the use of his own land where he would damage the lands or impair the water supply of his neighbors by taking to distant lands or to lands other than his own from which he takes.

In deciding what is a proper use by the party complained of, the fitness of his purpose is first looked to, which must be for the use and benefit of his own land on which the water is taken.

[15] Comyn's Digest, "Action on the Case for Nuisance," C. But it has recently been held that the damage must be for the reasonable purpose of securing his own welfare, and not where one, without profit, opens a rival business purely to ruin the neighbor, and then also to quit. Tuttle v. Buck (1909), 107 Minn. 145, 131 Am. St. Rep. 446, 119 N. W. 946, 22 L. R. A., N. S., 599, 16 Ann. Cas. 807, citing the percolating water cases. So, also (though the California court has emphatically, in People v. Schmitz, 7 Cal. App. 369, 94 Pac. 407, 419, followed the general rule that motive has no place in the common law), yet in Parkinson Co. v. Building Trades Council (1908), 154 Cal. 581, 98 Pac. 1027, 21 L. R. A., N. S., 550, Mr. Chief Justice Beatty said: "Any injury to a lawful business . . . . is *prima facie* actionable, *but may be defended upon the ground that it was merely the result of a lawful effort of the defendants to promote their own welfare.*" This was not concurred in by all the justices, as the case, being one of a labor boycott, caused much divergence of opinion. That the common law is coming to regard motive in justification of damage in other branches of the law is seen in the decisions looking to the purpose of motive of a combination in labor troubles, strikes and boycotts. See 18 Harvard Law Review, 411, 423, 444. In this connection see an instructive opinion by the late Mr. Justice McFarland in Fisher v. Feige (1902), 137 Cal. 42, 92 Am. St. Rep. 77, 69 Pac. 618, 59 L. R. A. 333.

[16] Smith v. City of Brooklyn, 18 App. Div. 340, 46 N. Y. Supp. 141.

It must be on his own land. It will not be justification of damage to neighboring land if the purpose of use is off his land, such as sale of the water to others. Thus, pumping to supply a city to the damage of a neighbor, is held wrongful.[17] The party complained of is not allowed to "make merchandise" of the water to the injury of his neighbor.[18] Such, also, was the precise question decided in Katz v. Walkinshaw, holding that averments that plaintiff had wells, the water of which was necessary and actually used for domestic use and irrigation on the land on which they were situated, and that defendants by means of other wells on other land drew off the water from plaintiff's wells, for use on a distant tract, causing plaintiff's wells to dry, sufficiently state a cause of action for diversion of percolating water.[19] Practically all the recent California cases granting relief are to this effect.[20]

No stronger ruling to this effect could have been made than in the case of Miller v. Bay Cities W. Co.,[21] where a company formed to supply the city of San Francisco with water was not only enjoined from pumping because of a possible interference with the ground-water in the thickly settled Santa Clara Valley, to the detriment of landowners there, but even enjoined from diverting a surface stream there because of a similar possibility that loss of the stream would injuriously affect the ground-water supply of the valley (owing to the fact that seepage from the stream was a large source of supply to the gravels), and even though the stream in flood time carried a large flow which did not seep into the ground, but went down the surface channel to the sea. The court first states the result of defendant's contention as being: "As an abstract proposition of law, applied to the concrete facts in this case, the contention of appellants is that, notwithstanding it is clearly established that the waters, surface and subsurface which either flow or percolate through the channel of the Coyote River, at or above the Lower Gorge, pass through well-defined artesian gravel

17 *Infra*, next section.

18 Erickson v. Crookston etc. Co., 100 Minn. 481, 111 N. W. 391, 8 L. R. A., N. S., 1250, 10 Ann. Cas. 843.

19 Katz v. Walkinshaw, 141 Cal. 117, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236. In one case it seems to be held (Pence v. Carney, 58 W. Va. 296, 112 Am. St. Rep. 963, 52 S. E. 702, 6 L. R. A., N. S., 266) that bottling water from a medicinal spring for sale elsewhere off the land may be done subject to the neighbor's right to a reasonable share for the same purpose, as well as for use on his land.

20 As they have been separately stated elsewhere, reference is made to those sections, without specific citation here. *Supra*, sec. 1048 et seq.

21 (1910) 157 Cal. 256, 107 Pac. 115, 27 L. R. A., N. S., 772.

strata in the Santa Clara Valley connected with the stream itself, and furnish a supply of water for irrigation to a territory to which its use is essential, still that territory can be deprived of this inestimable benefit by an appropriator seeking to divert all the waters of the river away from the stream as a commercial proposition, thus rendering the lands overlying the various artesian strata valueless, and that owners of these superimposed lands have no rights which are invaded, and, hence, no right to apply for an injunction to restrain such a diversion." And among many similar passages, says: "Such landowner has a right to restrain a diversion from the stream or saturated plane or other well-defined supply, by an appropriator or anyone else who seeks to divert such stream or other supplying waters from their natural percolating flow, for use elsewhere than upon lands to which, as waters of the stream, they are riparian, or which, as waters of an underground stratum, may reasonably and usefully be applied to the overlying land."[22]

(3d ed.)

§ 1123. Sale of Water.—It is thus an essential point of the new rule, that sale of water to alien land (such as cities and towns, for example), to the detriment of local land, is, as a general principle, unlawful,[23] just as under the common law of riparian rights.[24]

It has, indeed, been said that sale of the water off of one's own land may be a reasonable use where it is sold only to people living over the same water-bearing stratum from which the seller pumps, on the ground that, by each pumping for himself, they could accomplish the same result.[25] But this, starting with the rule of reasonable use, finds itself back to the English rule, for that was one of the arguments made in Chasemore v. Richards for holding sale off one's own land not to be wrongful, and for refusing to

[22] See this case more fully stated, *supra*, sec. 1057.

[23] Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. 115, 27 L. R. A., N. S., 772; Bonetti v. Ruiz (Cal. App.), 113 Pac. 118; Forbell v. New York, 164 N. Y. 522, 79 Am. St. Rep. 666, 58 N. E. 644, 51 L. R. A. 695; Stillwater etc. Co. v. Farmer, 89 Minn. 58, 99 Am. St. Rep. 541, 93 N. W. 907, 60 L. R. A. 875; Reisert v. New York, 69 App. Div. 302, 74 N. Y. Supp. 673; Hamby v. City of Dawson Springs, 126 Ky. 451, 104 S. W. 259, 12 L. R. A., N. S., 1164; Erickson v. Crookston W. Co., 100 Minn. 481, 111 N. W. 391, 8 L. R. A., N. S., 1250, 10 Ann. Cas. 843; S. C., 105 Minn. 182, 117 N. W. 435, 17 L. R. A., N. S., 650; Mecker v. City of East Orange, 77 N. J. L. 623, 134 Am. St. Rep. 798, 74 Atl. 379, 25 L. R. A., N. S., 465. See list of recent cases *supra*, sec. 1066, most of which are to this effect.

[24] *Supra*, secs. 815 et seq., 847.

[25] Erickson v. Crookston etc. Co., 105 Minn. 182, 117 N. W. 435, 17 L. R. A., N. S., 650.

adopt the rule of reasonable use of one's own land.[1] It would seem that the company must stand on the rights of its own land alone, unless it is a mutual company, or one acting only as agent for all and not for its own profit.[2]

(3d ed.)

§ 1124. **Conclusion.**—Although the subject is still in the experimental stage, yet this point that use is limited to one's own land whence the water is taken, if use elsewhere is a substantial detriment to neighbors, is firmly fixed, being the very point about which the new law is being shaped. Any cases where relief is denied the complaining landowner in such situation are but exceptions which do not militate against the general rule. These exceptions are considered in a later chapter.[3]

It is also fairly evident now that the point is equivalent to the limitation of use to riparian lands at common law. It is a silent triumph for the principles of the riparian system that, without any preconceived intention and acting independently with a sole view to justice and general good upon new lines, the courts throughout the country have broken away from precedent, and when now these decisions are collected and examined, they are found to be substantially the rules of the common law of streams. Especially is this noteworthy when, in the West, this new set of decisions has been laid down, as the cases themselves say, "to meet the imperative necessity of Western conditions." The new rule

[1] Lord Cranworth said in Chasemore v. Richards, 7 H. L. Cas. 349, 11 Eng. Reprint, 140: "It is said that, in this case, this is not a well sunk by a particular individual for his own purposes, but a great well, which has been sunk, and by which water has been raised to a very enormous extent, for supplying the whole town of Croydon. That argument does not affect my mind at all, because if it be conceded, as I think it must be conceded, that each and every one of the individuals residing upon this area might have sunk a well of his own to supply himself, it seems to me to be exactly the same thing," etc. In reply, Lord Wensleydale, who contended unsuccessfully for the rule of reasonable use of one's own land, said that would be well enough as to all, however numerous, who might live on the land of defendant where his well was built, but fails as an argument under the rule of reasonable use as to people not dwelling on the well-owner's land.

[2] A landowner may enjoin a well constructed by a city's grantee upon a highway adjacent to plaintiff's well on his own land, where the new well deteriorates plaintiff's land, and is dug for alien use. Bonetti v. Ruiz (Cal. App.), 113 Pac. 118. The owner of the fee of a street is held, in Hamby v. Dawson Springs, 126 Ky. 451, 13 Ky. Law Rep. 814, 104 S. W. 259, 12 L. R. A., N. S., 1164, to be entitled to an injunction to restrain the municipality from attempting to tap, by means of a well located in the street (to supply water free in opposition to the plaintiff), the vein supplying a valuable well of mineral water on his adjoining property.

[3] *Infra*, secs. 1156 et seq., 1171 et seq.

is said, in a passage typical of the recent California decisions, to have been adopted because of "the climatic conditions of this State, the great stretches of arid and semi-arid lands, the uncertainty of the seasons and varying rainfall, the necessity of irrigation and the vast superiority of underground waters as a steady and ready means of irrigation over the uncertainty of a similar supply from a surface stream which, in many instances, becomes dry at the very time when irrigation is necessary; the vast areas of land brought under cultivation and production by irrigation, and additional areas still to be improved by it; the enormous draft which this constant improvement and cultivation makes on a supply which is limited and which will become inadequate for all as population increases and additional lands are to be brought under cultivation and improved by irrigation."[4]

That is, it is now said that not only are the common-law principles of riparian rights applicable in the West, but the conditions of arid regions imperatively demand their further extension to percolating waters. And this is the language of the decisions, free from any coloring from any views the present writer may have; for the author's endeavor throughout this matter has been to present the subject as a mere reporter of what the courts are saying.

(3d ed.)

§ 1125. **Future Development.**—The future development may be expected to follow the questions arising under the common law of riparian rights.

The closer definition of what is local land upon which the water may be used (and of alien land upon which it may not) will involve the same questions as in regard to what is riparian land.[5] Thus may one, to the detriment of a neighbor, take water from a well in one tract of one's own for use upon a distant disconnected tract also of one's own, but not overlying the supply? The law of streams is against that, since the disconnected distant alien tract, having no natural access to the supply, is not entitled (no matter in whose ownership) to be used to the detriment of the lands naturally adjacent thereto.[6] Should it be different where the second tract, although disconnected with the first, overlies the same water

[4] Miller v. Bay Cities W. Co. (1910), 157 Cal. 256, 107 Pac. 115, 27 L. R. A., N. S., 772.

[5] *Supra*, sec. 768 et seq.

[6] *Supra*, secs. 766, 768.

plane? It would seem that there is a difference, since both tracts are then entitled, and it is like two disconnected tracts riparian and bordering upon the same stream.

Again, suppose the second tract is not owned by the man owning the well land, but nevertheless lies over the same water plane. It would seem that the second tract would have some right, like one riparian owner using water on the land of another riparian owner.

Likewise the question will probably arise (as under the law of riparian rights) of a whole parcel partly beyond a watershed,[7] or made up of small contiguous parcels acquired at different times.[8]

Especially, the question of what is a detriment to the land of a neighbor is already bringing up questions similar to those under the law of riparian rights.[9]

These questions show the similarity of the new rule of groundwater to the common law of riparian rights upon streams; and the development of both may be expected to follow the same lines. Indeed, the California court has now expressly declared that they are but different phases of one general system of law.[10]

7 *Supra*, sec. 773.
8 *Supra*, sec. 769.
9 *Infra*, sec. 1152 et seq.
10 *Supra*, secs. 1090, 1104.

§§ *1126–1132. (Blank numbers.)*

CHAPTER 46.

REASONABLE USE BETWEEN NEIGHBORING LANDOWNERS.

§ 1133. Introductory.
§ 1134. Equality of overlying landowners.
§ 1135. Must be for the benefit of the land.
§ 1136. A question of degree.
§ 1137. Apportionment.
§ 1138. Declaratory decree during nonuse.
§ 1139. Means of use of the land.
§ 1140. Drainage.
§ 1141. Importance in mining regions.
§ 1142. Statutory regulation.
§§ 1143–1151. (Blank numbers.)

(3d ed.)

§ **1133.** Having found that owners of alien lands not overlying the supply are excluded, and that owners of lands which do so overlie are confined to the use of their own lands so situated, the matter now remaining for consideration is the use between the overlying landowners *among themselves,* upon their own lands.

(3d ed.)

§ **1134. Equality of the Overlying Landowners.**—Since all the overlying landowners have equal opportunity of access to the water, and its presence contributes to the value and potential enjoyment of the land of all, they have a common interest in the water, and equal rights to use and share in its benefits and uses to the capacity of their lands. "The members of the community have a common interest in the water. It is necessary for all, and it is an anomaly in the law if one person can, for his individual profit, destroy the community and render the neighborhood uninhabitable."[1] Their rights are correlative, and interdependent. The landowner who first uses the water has not greater rights than other landowners.[2] Nor is the right of one lost by nonuse.[3]

[1] Temple, J., in Katz v. Walkinshaw, 141 Cal. 116, at 140, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236.

[2] Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748.

[3] *Ibid.*, and Burr v. Maclay R. Co., 154 Cal. 428, 98 Pac. 260.

All adjacent landowners "have *equal* access to the same supply";[4] the water is "common to all";[5] "the natural rights [of all adjacent landowners] in this common supply of water would therefore be coequal," etc.[6]

This is the same as under the common law of riparian rights.[7]

(3d ed.)

§ **1135. Must be for the Benefit of the Land.**—As shown in the previous chapter, use, to justify interference by the one with the other, must be made on the land of the party complained of. But further, it must be for the benefit of the land of the party complained of, as well as on it.

Where the water, though not taken off the land, is wasted without any benefit to the land, the damage to the neighbor is not justified.[8] It has, however, been held that a temporary waste while pumping out a well during sinking is not wrongful, if not continued after the well is down.[9] Irrigation is, of course, a justifying purpose, and the case of Southern Pacific Co. v. Dufour[10] may be rested on this ground without conflicting with the new rule.

When the use is upon one's own land for the benefit and advantage thereof, it is proper regardless of damage to a neighbor, so long as the damage is not excessive.[11]

(3d ed.)

§ **1136. A Question of Degree.**—Between two neighboring landowners claiming in respect to their own lands, and therefore for a fit purpose to justify interference with each other, it becomes entirely a question of degree how far this purpose may be carried out and still remain *damnum absque injuria.* While interference is *prima facie* wrongful, yet, because of the common interest and equality of all overlying landowners in the water supply, the reasonable use of his land by the party complained of,

4 Barclay v. Abraham, 121 Iowa, 619, 100 Am. St. Rep. 365, 96 N. W. 1080, 64 L. R. A. 255.

5 *Supra*, secs. 34, 1100, 1101.

6 Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748.

7 *Supra*, c. 1, secs. 684 et seq., 712. See Hudson v. Dailey, *supra*, sec. 1055.

8 Barclay v. Abraham, 121 Iowa, 619, 100 Am. St. Rep. 365, 96 N. W. 1080, 64 L. R. A. 255; St. Amand v. Lehman, 120 Ga. 253, 47 S. E. 949.

9 Pence v. Carney, *supra*.

10 95 Cal. 616, 30 Pac. 783, 19 L. R. A. 92.

11 Cases *supra*. See, also, Tampa W. W. Co. v. Cline, 37 Fla. 586, 53 Am. St. Rep. 262, 20 South. 780, 33 L. R. A. 376; Miller v. Black Rock Co., 99 Va. 747, 86 Am. St. Rep. 924, 40 S. E. 27; Herriman v. Kehl, 25 Utah, 96, 69 Pac. 719; Clark v. Lumber Co., 80 Miss. 535, 31 South. 905.

himself, is (in proper degree only) a proper excuse and justification; in the case of such excusable damage within proper limits the damage to the other still remains *damnum absque injuria,* for each must submit to that degree of inconvenience and hardship in the exercise of his rights which results from the existence of like rights in others.

It is question of degree. Although one's own irrigation (or, as below considered, mining or drainage) is permissible though it does damage, yet an excessive taking even for a fit purpose ceases to be *damnum absque injuria.* For example, if a complaining irrigator suffers damage, the other's irrigation on his own land is a proper defense, yet not to the extent of taking the entire water supply, though for his own irrigation upon his own land. It is a defense only to a reasonable degree, which degree must be determined by the comparative necessities and comparative hardships. The question is, as at the common law of riparian rights, to be determined upon the rights and necessities of both parties in equality of consideration upon all surrounding circumstances, as a question of fact in each case.[12] This is the principle laid down by Mr. Justice Shaw: "The same distinction exists with respect to cases cited involving the taking of percolating water for use by one owner *upon his land,* to the detriment of other land over the same saturated plane. The rights in such cases are correlative, and if an injunction can issue at all therein, it can be only when one

[12] Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748; Erickson v. Crookston etc. Co., 105 Minn. 182, 117 N. W. 435, 17 L. R. A., N. S., 650; Pence v. Carney, 58 W. Va. 296, 112 Am. St. Rep. 963, 52 S. E. 702, 6 L. R. A., N. S., 266. It is said that the reasonable use allowed each is such as would come within the maxim, "*Sic utere tuo ut alienum non laedas.*" Katz v. Walkinshaw, 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236; Montecito Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113; Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748; Miller v. Bay Cities W. Co. (1910), 157 Cal. 256, 107 Pac. 115, 27 L. R. A., N. S., 772; Stillwater Co. v. Farmer, 89 Minn. 58, 99 Am. St. Rep. 541, 93 N. W. 907, 60 L. R. A. 875; Gagnon v. French Lick etc. Hotel, 163 Ind. 687, 72 N. E. 849, 68 L. R. A. 175. But there is no magic in Latin phrases. This one, especially, leads to entanglement in regard to the distinction between "damage" and "injury," which have by no means the same meaning in the law. Consequently we have avoided use of that maxim, and preferred to deal with the matter in the English language. As has been said: "Confessedly, the absolute dominion of a proprietor over his land to the center of the earth is restrained by the maxim, '*Sic utere tuo ut alienum non laedas.*' But what is an injury? The rightful use of one's land may cause damage to another without any legal wrong. An act done, causing damage which the law will redress, must not only be hurtful, but wrongful." Haldeman v. Bruckhart, 45 Pa. 514, 84 Am. Dec. 511, 5 Morr. Min. Rep. 108.

owner takes more than his due proportion and damage to the other ensues from such *excessive* taking."[13]

The use and betterment of one's own land is thus a justification of damage only to a reasonable degree, as in regard to "artificial uses" under the law of riparian rights. It is not likely that any preference will be given to "natural uses" (domestic uses), whereby the *degree* of damage is passed by and only the purpose regarded; for even at common law this classification is being abandoned, and no purpose of use is sanctioned beyond a reasonable degree, to be determined on the facts of each case, as elsewhere discussed.[14]

(3d ed.)

§ 1137. **Apportionment.**—To secure to two contesting neighboring proprietors the equal, reasonable use of his own land to which each is entitled, a court of equity probably will (as at the common law of riparian rights)[15] apportion the water in such manner as may be reasonable and just under all the surrounding circumstances. It has been said: "Disputes between overlying landowners concerning water *for use on the land,* to which they have an equal right, in cases where the supply is insufficient for all, are to be settled by giving to each a fair and just proportion."[16]

But no apportionment can be made without evidence of all the material circumstances surrounding the case, which would show

[13] Anaheim W. Co. v. Fuller, 150 Cal. 327, at 335, 88 Pac. 978. Italics ours. "Each of the parties to the action should be restricted to a reasonable use of the water, with due regard to the rights of the other." Erickson v. Crookston etc. Co., 105 Minn. 182, 117 N. W. 435, 17 L. R. A., N. S., 650.

A recent New York case (Hathorn v. Sanatorium, 55 Misc. Rep. 445, 106 N. Y. Supp. 554) is really to this effect. It was held that a landowner at the famous Saratoga Springs cannot pump mineral water from a well, though for use of a sanatorium on his own land, to such an extent as entirely destroys a spring on his neighbor's land. While thus deciding the rule of reasonable use, the opinion says, "The doctrine of reasonable use has no application to percolating water." It rests the decision on the ground that the new modification of the English rule consists in prohibiting the use of pumps or similar apparatus which put a compulsion on the water in the neighbor's land instead of leaving it to natural laws, and says that such compulsion is unlawful for whatever purpose or place of use or degree of damage. This would be going to just as extreme a position in one direction as Acton v. Blundell went in the other. The decision might well have rested on the excessive degree of defendant's taking, as not being a reasonable use, though for and on his own land. See Strang v. New York, 127 N. Y. Supp. 231.

[14] *Supra,* sec. 741.

[15] *Supra,* sec. 751.

[16] Mr. Justice Shaw in Katz v. Walkinshaw, 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236.

what would be reasonable. Without such evidence there is no basis for a decree in apportionment.[17] No case has yet reached the California supreme court in which an apportionment between local uses was actually involved or made.

(3d ed.)

§ 1138. **Declaratory Decree During Nonuse.**—If one makes a use on his own land in excess of that to which, on the principle of equality, he would be reasonably entitled, then conversely he is taking the share belonging to his neighbors, although the neighbors be not themselves at present using it. He is deteriorating their water supply and preventing them from using their land in the future, and is doing them a wrong in that way by his excessive taking. Priority of use by one (or conversely, nonuse by others) does not diminish the right of each to the reasonable use of his land, a matter now definitely settled by Mr. Justice Shaw, in Hudson v. Dailey,[18] though some doubt upon this had been left by his opinion in Katz v. Walkinshaw.[19]

But to avoid such injury by excessive local use by one during the nonuse of the complaining party, the latter will probably be protected only by a declaratory decree. A prohibitive injunction will probably be denied until the time when the excessive use does actual damage to the use of the neighbor when he starts to make it; in the meantime declaring by decree that he has the right so to start at any time, and establishing complainant's right to a reasonable use when he should desire the water in the future. This has not yet been actually decided between local uses, but would seem to follow from the actual decision so made in a case involving distant use.[20]

(3d ed.)

§ 1139. **Means of Use of the Land.**—"Whether subterranean waters are procured by means of driving tunnels or the operation of pumps, they are obtained in either instance by artificial, and not by natural, means. Tunnels are practically horizontal wells, differing from ordinary wells only in this, that the waters from the

17 Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748. See *supra*, sec. 751.

18 156 Cal. 617, 105 Pac. 751.

19 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236.

20 Burr v. Maclay R. Co., 154 Cal. 428, 98 Pac. 260, a case decided only between a local and an alien use, but applying, upon principle, still more strongly between two neighboring local landowners. See *infra*, secs. 1156, 1173; *supra*, secs. 802, 831, under the common law of riparian rights.

former find their way by gravity flow, while in the latter pumping must be resorted to, to bring the water to the surface. They both disturb the natural conditions of the flow of the subterranean waters and differ only as to the method of that disturbance. The result, however, is the same; they are both artificial means of reaching and controlling the natural subterranean flow and are equally means of developing water." [21]

As in the law of streams,[22] it here also seems immaterial what means are used,[23] and the mode of enjoyment may be changed so long as the change does not require a physical trespass on the property of the complaining proprietor nor create any additional draft on the supply nor otherwise injure complainant's land, conceding that the party complained of was within his rights in his original taking. In Barton v. Riverside W. Co.,[24] the court said: "The wells of the Riverside Highland Water Company are of more recent construction, and perhaps, as to some of them, there may be no *laches* or estoppel against the plaintiffs. But the injunction against this company was properly refused on still another ground. It is established by the evidence that the said defendant had originally obtained the water solely by means of artesian wells, that for ten years or more before the action was begun it had been maintaining such wells in the northwestern part of the basin several miles distant from the new wells here complained of, and that from said wells defendant had obtained a flow of about four hundred inches of water which it had been continuously transporting to places of use outside the basin, distributing the same to its customers and that by this means large and valuable improvements had been made in the territory to which this water had been conducted. It had gained the undisputed right to take the water by this means and to this place. From the causes heretofore mentioned [natural drought] its wells began to fail and the new wells complained of were thereupon sunk in the same basin, solely for the purpose of obtaining enough water, in connection with its old wells, to keep up its former supply to its former customers. The new wells take from the same supply as the old ones and the total amount taken has not been and is not to be increased. They constitute a mere change of the place of diversion without injury

21 Garvey W. Co. v. Huntington W. Co. (1908), 154 Cal. 232, 97 Pac. 428.

22 *Supra*, secs. 452 et seq., 501, 754.

23 See Katz v. Walkinshaw, 141 Cal. 116, at 130, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236.

24 Mr. Justice Shaw in (1909) 155 Cal. 509, 101 Pac. 790, 23 L. R. A., N. S., 331.

to others. In the case of running streams the right to make such a change is well settled, and it is clearly just.[25] The rule is the same with regard to underground streams.[1] We think the reasons of this rule apply with equal if not greater force to one having a right to take a definite quantity of water from a basin of permeable material saturated with water and not composing part of any stream, conceding this basin to be of that character as plaintiffs claim, and that said defendant is accordingly acting within its established rights in maintaining these new wells."

The same case upheld change by another company from open cuts in a gravel-bed to wells requiring pumping.

Another case is to the same effect regarding change from a ditch tapping a stream to a well dug in the region whose ground-waters supply the stream.[2]

(3d ed.)

§ 1140. **Drainage.**—The reasonable use being use of land (and not necessarily of water if the land may be used without the water), then drainage is a proper purpose and a reasonable use of land where the land is thereby benefited. Accordingly, it is Mr. Justice Temple's view (Katz v. Walkinshaw) that damage to a neighbor from mining, excavating, clearing forests, drainage, etc., is not wrongful, though, of course, the party complained of does not himself in such cases actually use the water. It is waste of water but for the benefit of the land, and the drainage of land is as proper a purpose as irrigation, for example, and the damage to the complaining party just as much *damnum absque injuria.* We quote to this effect from the opinion of Mr. Justice Temple in Katz v. Walkinshaw:

"The proprietor may make a reasonable use of his own land, although in so doing he obstructs or changes the percolation of water to or from his neighbor's land" (at page 146). "The peculiar nature of the property which enables one to take it by drainage does not justify the taking save in the usual and reasonable use of his own land—in other words, for the proper use and betterment of his own property" (at page 147). Concerning a passage in Hanson v. McCue,[3] he says (though not citing that case): "It is said one could not clear or cultivate his land or build

25 See *supra*, sec. 496.

1 Citing Vineland Irr. Dist. v. Azusa Irr. Co., 126 Cal. 495, 58 Pac. 1057, 46 L. R. A. 820.

2 Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748.

3 42 Cal. 303, 10 Am. Rep. 299.

a house without interfering with percolating water, and, even if rights were admitted to exist, the difficulty of enforcing them would be insurmountable. I think I have shown that the admitted right to a reasonable use of the land and of the water answers all these objections. To my mind, this is so obvious that I can but wonder that such objections have ever troubled the judiciary." Commenting upon Acton v. Blundell, he says: "The court instructed the jury 'that, if the defendants had proceeded and acted in the usual and proper manner in the land for the purpose of working and mining a coal mine therein, they might lawfully do so.' This instruction was held to be correct, and that is the real force and effect of the decision. . . . . In Acton v. Blundell, as has been said, the working of a mine upon an adjoining estate drained certain springs on plaintiff's land. It would have been sufficient to defeat plaintiff's action to have said that the working of a coal mine in a proper manner is a reasonable use of land, and that it was without malice, or an intent to injure plaintiff. It is a general rule—in fact, a universal principle of law—that one may make reasonable use of his own property, although such use results in injury to another."[4]

In Kansas there is a statute governing rights in percolating water, but adding that it shall not be so construed as to render any person liable in damages for the diversion or obstruction of the flow of subterranean waters by lawfully excavating for cellars or for mining, quarrying, or carrying on like works on his own lands, nor for excavating drains for draining and improving his own lands.[5]

A similar explanation regarding mining had been made before Katz v. Walkinshaw by McFarland, J., dissenting, in Southern Pacific Co. v. Dufour[6] (referring to Wheatley v. Baugh):[7] "The

[4] The same comment was made upon Acton v. Blundell in the opinion of Lord Wensleydale (Baron Parke), virtually dissenting, in Chasemore v. Richards, 7 H. L. Cas. 387, 11 Eng. Reprint, 140, saying: "The case of Acton v. Blundell would be rightly decided upon this ground, because the injury to plaintiff's well was caused by the lawful exercise of the defendant's right to get the minerals in his land." In Salt Union etc. v. Brunner (1906), 2 K. B. 832, Lord Alverston, Chief Justice, said the principle of Acton v. Blundell was "that the exercise of a lawful right of mining does not become unlawful because it may injure adjoining properties"; and held that if the withdrawal of percolating water from a neighbor's land carries with it some peculiar valuable substance in his soil (e. g., rock salt, passing into solution), it is still not unlawful.

[5] *Infra*, sec. 1436.

[6] 95 Cal. 616, 30 Pac. 783, 19 L. R. A. 92.

[7] 25 Pa. 528, 64 Am. Dec. 721, 13 Morr. Min. Rep. 374.

facts were that 'a mining corporation, in the course of necessary operations in mining minerals from their own land, interrupted the percolations which supplied a spring on an adjoining tract'; and of course the court held that where a miner, working his mine in the usual way, interrupts percolating underground water, the result is incidental to the lawful use of his land, and if it causes loss to an adjoining proprietor, such loss is *damnum absque injuria*. . . . . Nearly all the cases in which the disturbance of percolating water has been held harmless have been cases where the party charged has dug a well or worked a mine or made some other excavation in the lawful enjoyment of the ordinary use of his land, and where the loss to the complaining party was merely incidental to such use, and not the result of a direct intent to cause such loss."

The civil law considered mining within the principle of the improvement of the land in this connection, and not actionable.[8]

Whether, under the new rule, mining or drainage will be a justifying use, cannot, however, be said. It seems to have been held wrongful in some cases where the mine shaft by percolation diminished the flow of a stream by intercepting percolations tributary to the stream,[9] or the subflow of a stream.[10] Likewise Shaw, J., in Katz v. Walkinshaw,[11] discussing Cross v. Kitts,[12] considers that case as deciding that a miner cannot cut off the percolations which feed a stream, though done in the legitimate work of mining his own land, and approves Cross v. Kitts on that ground (though in fact there was in Cross v. Kitts the added element of a grant between the parties).

If excavation on one's own land is offered in justification, it must, at all events, be done in good faith for the benefit of the land, and not merely to injure the neighbor.[13]

8 Lord Wensleydale in Chasemore v. Richards.

9 Cole Silver Min. Co. v. Virginia etc. Co., 1 Saw. 470, Fed. Cas. No. 2989, 7 Morr. Min. Rep. 503; Cross v. Kitts, 69 Cal. 217, 58 Am. St. Rep. 558, 10 Pac. 409; Herriman etc. Co. v. Butterfield etc. Co., 19 Utah, 453, 57 Pac. 537, 51 L. R. A. 930. But *contra*, Acton v. Blundell.

10 Copper etc. Co. v. Wabash etc. Co., 114 Fed. 991, 22 Morr. Min. Rep. 164.

11 141 Cal. 116, at 129, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236.

12 69 Cal. 217, 58 Am. St. Rep. 558, 10 Pac. 409.

13 St. Amand v. Lehman, 120 Ga. 253, 47 S. E. 949 (a case of blasting); Bartlett v. O'Connor (Cal.), 36 Pac. 513 (a drainage ditch). Cf. Parker v. Larsen, 86 Cal. 236, 21 Am. St. Rep. 30, 24 Pac. 989.

(3d ed.)

§ 1141. **Importance in Mining Regions.**—This is of great importance to miners, because their works are likely to drain wells and springs and even streams in the neighborhood. As an eminent authority says: "In sinking a shaft through permeable ground it is, of course, necessary to lift continuously the ground-water. The water level thus acquires an inclination toward the shaft, which may thus receive not only the flow of the immediate vicinity, but even also that of neighboring river systems."[14]

In an early California case the bearing of the law of percolating water upon mining was adverted to, saying: "These are grave questions which the exigency of the present case does not require us to decide."[15]

If mining is not a justifying purpose of use to a reasonable degree as above set forth, then the miner would be practically an insurer to agriculturists against damage to crops from failure of water supply and it may be doubted whether even the results in extraordinarily dry seasons (i. e., "*vis major*" or "act of God") could be excepted. This result was one of the reasons given in Acton v. Blundell[16] for holding as it did, saying:

"In the case of a running stream, the owner of the soil merely transmits the water over its surface; he receives as much from his higher neighbor as he sends down to his neighbor below; he is neither better nor worse; the level of the water remains the same. But if the man who sinks the well in his own land can acquire by that act an absolute and indefeasible right to the water that collects in it, he has the power of preventing his neighbor from making any use of the spring in his own soil which shall interfere with the enjoyment of the well. He has the power, still further, of debarring the owner of the land in which the spring is first found, or through which it is transmitted, from draining his land for the

[14] Posepny on Ore Deposits (American Institute Mining Engineers), page 19. The following is an example of what is sometimes necessary in mining, and applies to other mining as well as coal mining: "The importance of the water problem in connection with anthracite mining is well shown by the fact that there are a number of pumping stations having capacities of from 5,000,000 to 10,000,000 gallons per day. The Gilberton water-shaft of the Philadelphia & Reading Co. is about 1,000 feet deep and is equipped with hoisting buckets. The capacity of the plant is 7,000,000 gallons per day, and it is designed to drain the entire basin operated from the Draper and Gilberton collieries." Transactions of the American Institute of Mining Engineers, vol. 34, p. 523.

Merely as an example, Kelly v. Hynes (Mont.), 108 Pac. 785, is cited as a case where mining drained springs.

[15] Hale v. McLea, 53 Cal. 578.

[16] 12 Mees. & W. 324.

proper cultivation of the soil, and thus, by an act which is voluntary on his part, and which may be entirely unsuspected by his neighbor, he may impose on such neighbor the necessity of bearing a heavy expense, if the latter has erected machinery for the purposes of mining, and discovers, when too late, that the appropriation of the water has already been made. Further, the advantage on one side, and the detriment to the other, may bear no proportion. The well may be sunk to supply a cottage, or a drinking-place for cattle; whilst the owner of the adjoining land may be prevented from winning metals and minerals of inestimable value. And, lastly, there is no limit of space within which the claim of right to an underground spring can be confined; in the present case, the nearest coal-pit is at the distance of half a mile from the well; it is obvious the law must equally apply if there is an interval of many miles." [17]

When one further decision is considered, it appears that the law of waters would be taking a form that leaves the miner at a decided disadvantage in controversy with his agricultural neighbors.[18] Not only would the miner be liable if the water is taken from wells, etc., but, on the other hand, he must suffer the percolation of waste water from irrigation into his mines, and has no right of action even if the water comes through in such quantities as to prevent the working of the mine. It was so held in Gibson v. Puchta.[19] The result would be that the miner must not take water from the farmer's land, but the farmer is not reciprocally bound to keep the water out of the miner's works. It would join with the "Debris Cases" in showing sharply that mining has ceased to be the paramount industry in California, and that agriculture has taken its place.

The relation of the new rule to mining is one of the many phases of the new doctrine of percolating water that the case of Katz v. Walkinshaw has thrown open, and that await decision. Under Mr. Justice Temple's view, mining would be a proper purpose and the withdrawal of percolating water thereby (at least, to a reasonable degree) not wrongful, though it damages the farmer. The irrigation case cited above (Gibson v. Puchta) went

[17] See, also, Wheatley v. Baugh, 25 Pa. 532, 64 Am. Dec. 721, 13 Morr. Min. Rep. 374.

[18] See Harvard Law Review, 46.

[19] 33 Cal. 310, 12 Morr. Min. Rep. 227, quoted *supra*, sec. 461 et seq. A somewhat similar decision appears in Lisonbee v. Monroe, 18 Utah, 343, 72 Am. St. Rep. 784, 54 Pac. 1009. But *semble contra*, Parker v. Larsen, 86 Cal. 236, 21 Am. St. Rep. 30, 24 Pac. 989, *dictum*.

on the ground that the defendant's purpose or motive arose out of the undoubted right to cultivate and irrigate his land. If the purpose or motive is looked into on one side, it should also be looked into on the other. If the motive to make profit by cultivating and planting in the ordinary way justifies the farmer in irrigating, though he damages the miner, the motive to profit by mining in the ordinary way should justify the drainage of percolating water naturally incident to that (at least, to a reasonable degree). Any damage which occurs would then lie where the nature of the land as mineral or agricultural makes it fall.[20]

(3d ed.)

§ 1142. **Statutory Regulation.**—The new rule, being based upon the principle of securing a reasonable use to many people interested in a common supply, offers a ready field for statutory regulation, as is generally the case where the common law has based a system upon "reasonableness."[21] For example, statutes exist in several States for the prevention of waste from artesian wells.[22] The California statute, as amended in 1909, provides that any artesian well not capped, etc., to readily prevent the flow is a public nuisance; the landowner, etc., is guilty of a misdemeanor for not so capping it, and also if he wastes the flow or lets it waste; and anything except irrigation, storage, domestic use or propagation of fish is waste, and irrigation is wasteful if more than five per cent of the water received on the land escapes, and storage is wasteful as to any excess stored over one-tenth of a miner's inch per acre each year.

[20] Compare a case where a miner, in driving a tunnel under a hill, caused a water ditch along the hillside to cave in. It was said, by way of *dictum*, that the doctrine "*sic utere tuo*" might well defend the miner in such a case, if acting simply in the legitimate mining of his own land. Clark v. Willett, 35 Cal. 534, 4 Morr. Min. Rep. 628, citing Gibson v. Puchta, *supra*.

[21] For example, the law of public service is based upon the principle that public service companies must conform to a reasonable conduct toward the public, and public service commissions, or other more or less extensive statutory systems, are generally provided to enforce "reasonableness."

[22] *California.*—Cal. Stats. 1907, p. 122, amd. 1909, c. 427 (quoted *infra*, sec. 1432). Compare Cal. Stats. 1909, c. 356, regulating use of oil wells.

Kansas.—Gen. Stats. 1901, sec. 3523 et seq.; amd. by Stats. 1911, *infra*, sec. 1436. See, also, Stats. 1911, c. 210, p. 363.

Nebraska.—Comp. Stats. 1903, sec. 6407; Cobbey's Ann. Stats., sec. 6888 et seq.

New Mexico.—Laws 1909, p. 177, c. 64. See, also, Stats. 1909, c. 64, amd. by Stats. 1909, p. 382.

New York.—Laws 1908, c. 429.

South Dakota.—Rev. Codes 1905, sec. 2680 et seq.

The 1907 statute has been held constitutional,[23] relying on Ohio Oil Co. v. Indiana,[24] where the regulation by statute of the use of oil and natural gas wells was upheld, with a *dictum* that the same would be true of percolating water. The United States supreme court there said *inter alia:* "This necessarily implied legislative authority is borne out by the analogy suggested by things *ferae naturae,*[25] which it is unquestioned the legislature has the authority to forbid all from taking, in order to protect them from undue destruction, so that the right of the common owners, the public, to reduce to possession, may be ultimately efficaciously enjoyed." The power to regulate rests, not upon State proprietorship, but upon regulative power upon behalf of the overlying landowners.[1]

A later California case dealt with a similar earlier statute. The question was whether a party had acquired a prescriptive right to supply from his well. His opponent claimed that he had left his wells uncapped during the winter in the years of the prescriptive period, allowing the waters to flow unused into a stream when not needing it, an act which the statute declared a public nuisance.[2] But the prescriptive right was allowed, holding that it was good by prescription against private parties whatever might be its status against public action to abate it.[3]

A recent New York statute [4] makes it unlawful to pump, or by any artificial contrivance accelerate the natural flow or produce an unnatural flow of, mineral waters holding in solution natural mineral salts and an excess of carbonic acid gas, from wells bored or drilled in rock. The statute provides that an action to restrain such acts may be brought by any citizen of the State in the city or town in which he pays taxes; also, that the attorney

[23] Ex parte Elam, 6 Cal. App. 233, 91 Pac. 811, quoted *supra,* sec. 1062. The amendment since adopted has not yet been passed upon.

[24] 177 U. S. 190, 20 Sup. Ct. Rep. 576, 44 L. Ed. 729, 20 Morr. Min. Rep. 466. *Accord,* Lindsley v. Natural Carbonic etc. Co. (U. S. 1911), 31 Sup. Ct. Rep. 337, a case upholding the New York percolating water statute.

[25] *Supra,* sec. 33.

[1] People v. New York Co., 196 N. Y. 421, 90 N. E. 441, Cullen, C. J.

[2] Stats. 1877–78, p. 195.

[3] Moreover, the court says: "A further sufficient answer to this point is that the water from these wells did not go to waste during the irrigating season. The fact that it was allowed to flow without use during the winter when it was not needed for use by anyone might make the uncapped wells a public nuisance during that season, but it would not have that effect during the time when the water was used, nor would it prevent Currier from acquiring, by adverse use during the regularly recurring irrigation seasons, the right to divert the water by the wells during that season." Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748.

[4] Laws 1908, c. 429.

general may bring such action in his discretion, and that it is his duty to do so on a written request of ten citizen taxpayers who are assessed to the amount of ten thousand dollars or more. The New York courts hold that the statute may regulate use of wells to prohibit (when damage occurs to other wells) heavier draft through any well than the natural movement of percolation would supply without artificial acceleration, but cannot prohibit use absolutely.[5] It is further held in New York that the legislature may authorize suit to be brought by the attorney general.[6] The legislature may regulate and limit use of percolating water and prohibit its use for marketing as merchandise, to the injury of other well-owners, but certain limitations in the New York statute prohibiting one from pumping absolutely, and from diminishing the flow in a neighbor's well *at all*, were held unconstitutional as depriving the landowner complained of, of a reasonable use of his own land.[7]

[5] Hathorn v. Natural Carbonic Gas Co. (1908), 128 App. Div. 33, 112 N. Y. Supp. 374; People v. New York Carbonic etc. Co. (1908), 128 App. Div. 42, 112 N. Y. Supp. 381; Same v. Same, 196 N. Y. 421, 90 N. E. 441.

[6] People v. New York etc. Co. (1908), 128 App. Div. 42, 112 N. Y. Supp. 381; Same v. Same, 196 N. Y. 421, 90 N. E. 441.

[7] Hathorn v. Natural Carbonic Gas Co. (1909), 194 N. Y. 504, 128 Am. St. Rep. 555, 87 N. E. 504, 23 L. R. A., N. S., 436, 16 Ann. Cas. 989. For a case denying the right to regulate at all, based on the old rule of percolating water, see Huber v. Merkel, 117 Wis. 355, 98 Am. St. Rep. 933, 94 N. W. 354, 62 L. R. A. 589.

§§ *1143–1151. (Blank numbers.)*

CHAPTER 47.

PROTECTION OF THE RIGHT TO UNDERGROUND WATER.

A. AGAINST AN EXCESSIVE LOCAL USE.

§ 1152. Excessive local use.

B. BETWEEN A LOCAL AND AN ALIEN USE.

§ 1153. No question of reasonableness.
§ 1154. Damage will not be implied.
§ 1155. Prospective damage to the local land.
§ 1156. Declaratory decree.
§ 1157. Distant use of surplus.
§ 1158. Same—Not an absolute "appropriation."
§ 1159. Distant use by both parties.
§§ 1160–1168. (Blank numbers.)

A. AGAINST AN EXCESSIVE LOCAL USE.

(3d ed.)

§ 1152. Excessive Local Use.—What constitutes a wrong to one's land when done by a neighbor's use of his own land is a matter covered by the preceding chapter, and is now recapitulated shortly, for the purpose of contrast with the protection of one's right against a distant alien use by another not using the water on his own land whence taken.

Between local users, complainant must show a possible damage to the use of his land, or a depreciation of its water supply or of its value—a damage in respect to his land. It need not be an actual present damage to use; it may be a prospective damage to future use, the land being now in nonuse. But the showing of such interference or damage alone is not enough to constitute a wrong between local users. There must be a further showing that it is in excess of the reasonable use of his land to which the party complained of is entitled. To a reasonable degree it is a good defense to the proprietor complained of that he is acting in the use of his own land on which he took the water. "It is a general rule—in fact, a universal principle of law—that one may make reasonable use of his own property, although such use results in injury to another,"[1] and this is but one appli-

[1] Katz v. Walkinshaw, 141 Cal. 116, at 143, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, Temple, J.

cation of that rule. What is a reasonable use by one overlying proprietor on his own land to which another must submit, though it interferes with the land (or its use) of such other overlying proprietor, is a question of fact, depending upon the circumstances of each case.

Under a doctrine of exclusive rights by prior appropriation, the right, being founded on priority, would be exclusive to the extent of the priority. But under the law of correlative rights now established for percolating water no one[2] can have an exclusive right against another overlying proprietor, and no use by one overlying owner for his own land is wrongful unless it unreasonably exceeds the equality of right among all; in the absence of such excess any damage to the other overlying lands is *damnum absque injuria.* The fact that one overlying proprietor's use, or possibility of use in the future, of his land, is interfered with by another overlying proprietor, is not alone a wrong to him; it must be such interference as is in excess of the equal right of the overlying proprietor complained of. Each must submit to that degree of inconvenience and hardship in the exercise of his rights, which results from the existence of like rights in others.

This is equally the rule under the common law of riparian rights upon streams,[3] and hence, where a stream and groundwater are united in nature into one supply, the question between well-owners and stream riparian proprietors remains whether the interference with stream or with well is done in the reasonable use of his own land by the stream riparian owner who interferes (through the stream) with the well, or by the well-owner who interferes (through his well) with the flow of the stream.[4]

B. BETWEEN A LOCAL AND AN ALIEN USE.

(3d ed.)

§ **1153. No Question of Reasonableness.**—Where, however, the party complained of is not seeking use on and for the bene-

2 Excepting grant, condemnation or prescription, and excepting the pueblo right of the city of Los Angeles. *Supra,* secs. 68, 1056.

3 *Supra,* sec. 799 et seq.

4 *Supra,* secs. 1083, 1090. Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748; Miller v. Bay Cities etc. Co. (1910), 157 Cal. 256, 107 Pac. 115, 27 L. R. A., N. S., 772. Excepting the pueblo right of Los Angeles, which is allowed to override the reasonable use of one's own land by valley landowners. Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. 755.

fit of his own land, but is using the water or selling it on distant land (whether of his own or of other parties), there is no question of sharing or proportionate division.[5]

If actual present damage results to complainant in the use of his land, he is entitled to a prohibitive injunction against all such acts causing such damage. Such (with the exception, in part, of the Burr case) are all the recent California cases elsewhere stated, granting relief—the complaining party was actually using the water on his land and suffered actual present damage.[6] In Katz v. Walkinshaw, all trees, vines and shrubbery on plaintiff's land were threatened with destruction. In Miller v. Bay Cities W. Co. the destruction of an entire valley was declared to be threatened.

(3d ed.)

§ 1154. Damage will not be Implied.—But a diversion of percolating water is not a wrong *per se.* This was expressly held in Burr v. Maclay R. Co., *infra.* So likewise most of the cases refusing relief[7] actually so held, and it appears consistently in the others as *dictum.* Loss of natural subirrigation,[8] as an argument supporting the rule of damage from diversion *per se,* as held in some cases under riparian rights on streams,[9] is here denied. The Newport case dealt with it, the plaintiff having contended

[5] Anaheim W. Co. v. Fuller, 150 Cal. 335, 88 Pac. 978. Cf. Miller v. Madera Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391. See *supra,* sec. 817.

[6] For example, Katz v. Walkinshaw, 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236; McClintock v. Hudson, 141 Cal. 275, 74 Pac. 849; Cohen v. La Canada W. Co. (first appeal), 142 Cal. 437, 76 Pac. 47; Miller v. Bay Cities W. Co. (1910), 157 Cal. 256, 107 Pac. 115, 27 L. R. A., N. S., 772.

[7] Newport v. Temescal W. Co., 149 Cal. 531, 87 Pac. 372, 6 L. R. A., N. S., 1098; Cohen v. La Canada W. Co. (second appeal), 151 Cal. 680, 91 Pac. 584, 11 L. R. A., N. S., 752. See, also, Montecito W. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113; Strang v. City of New York, 127 N. Y. Supp. 231.

[8] In the Nineteenth Annual Report of the United States Geological Survey (part II, page 274), in an elaborate investigation of the movements of ground-water, it is said: "In another part of this paper it was shown, from direct observations, that the withdrawal of a comparatively small amount of water from a soil already saturated is sufficient to produce a marked change in the level of the ground-water, and hence to cause marked change in the level of waters in wells, and in the height of the ground-water in sections *where crops depend on water which is derived from the underflow by natural subirrigation.*"

[9] E. g., Heilbron v. Last Chance Water Co., 75 Cal. 117, 7 Am. St. Rep. 183, 17 Pac. 65, saying: "The flow of the water of a stream, whether it overflow the banks, or not, naturally irrigates and moistens the ground to a great and unknown extent, and thus stimulates vegetation." See *supra,* sec. 829.

that the pumping *per se* damaged his land because it dried up the land (irrespective of depletion of wells), and deprived it of the under-percolation naturally subirrigating it; but instead of assuming this to be true, it was examined into in the Newport case like any other question of fact, and found not to exist to any substantial degree. Instead of being assumed as a damage *per se*, it is here left to actual proof as a question of fact bearing on the possibility of damage to the land and its use in the future.

Mere lowering of water plane is not *per se* a wrong (lowering of ten feet).[10] Lowering water level fifty feet so as to prevent hand-pumping is not alone ground for injunction where the supply at that depth is not diminished, and plaintiff could readily install a power pump, provided (a question of fact) defendant could not reasonably accomplish its design by some other practicable way.[11] Lowering of twenty-one feet is wrongful where it makes use of existing pumps impossible, and threatens a permanent destruction of supply;[12] likewise a lowering of seventy-five feet under similar circumstances.[13] Another case holds: "The effect of the defendant's pumping for a period of a little over eighteen months was to lower the permanent water level, as it stood when the pumps were idle, as much as seven feet. By reason thereof the plaintiff is compelled to lift the water seven feet higher than before the defendant began its present appropriation. Perhaps, in view of the extreme necessity for water, and the great benefit derived therefrom, this additional burden upon the plaintiff may not be unreasonable."[14] In one jurisdiction it is provided by statute that "any appropriation and diversion of subterranean waters which simply lower a water level without in fact exhausting or seriously diminishing the actual and needful supply of any prior appropriator for domestic or other beneficial uses shall not be considered an unlawful appropriation or diversion thereof."[15] In a late New York case where plaintiffs showed lowering of water plane and loss in annual crop yield, it appeared that the lowering was not detrimental and that the crop loss was due

10 Newport v. Temescal W. Co., 149 Cal. 531, 87 Pac. 1072, 6 L. R. A., N. S., 1098.

11 Erickson v. Crookston etc. Co., 105 Minn. 182, 117 N. W. 435, 17 L. R. A., N. S., 650.

12 Burr v. Maclay R. Co., 154 Cal. 428, 98 Pac. 260.

13 Willis v. City of Perry, 92 Iowa, 297, 60 N. W. 728, 26 L. R. A. 124.

14 Burr v. Maclay R. Co., 154 Cal. 428, 98 Pac. 260.

15 Kansas Gen. Stats. 1901, sec. 3631. See amendments thereof, *infra*, sec. 1436.

to other causes than defendant's pumping, and injunction was refused upon the express ground that plaintiff showed no deterioration of his land of which the defendant city could be said to be the cause.[16]

Nor is mere diminution of pressure *per se* wrongful.[17]

Nor is a taking wrongful where there is shown to be no geological subterranean connection between the pumping or other works, and plaintiff's land.[18]

(3d ed.)

§ 1155. **Prospective Damage to the Local Land.**—To entitle the complaining party to relief against the distant use while not himself using the water on his land, and hence suffering no present damage, it must actually appear that the impairment of water supply by diversion for distant use will interfere with the use of the water by complainant on his land in the future, or will deteriorate the value and adaptability to full use of his land, or that a taking for distant use will interfere with his enjoyment of his rights in a watercourse.

Where such possible damage, though only prospective, appears, it is wrongful. The complainant's right to a full supply is paramount to any distant use that would prevent it, to the extent of such prevention, though the distant use be prior in time. No "appropriation" for distant use will be permitted to defeat the use of one's own land at any time, present or future, though now in nonuse. In Burr v. Maclay R. Co.[19] it was held to be the right of plaintiff to have the supply protected for future use upon the portion of his lands not hitherto supplied with water, the court saying (per Mr. Justice Shaw): "The reasonable rule here would be to hold that the defendant's appropriation for distant lands is subject to the reasonable use of the water on lands overlying the supply, particularly in the hands of persons who have acquired it because of these natural advantages, and we

[16] Strang v. City of New York, 127 N. Y. Supp. 231. The taking was twenty-five per cent of the annual rainfall.

[17] Mentone Irr. Co. v. Redlands Co. (1909), 155 Cal. 323, 100 Pac. 1082, 23 L. R. A., N. S., 382. But see Miller v. Bay Cities W. Co. (1910), 157 Cal. 256, 107 Pac. 115, 27 L. R. A., N. S., 772.

[18] Newport v. Temescal W. Co., 149 Cal. 531, 87 Pac. 372, 6 L. R. A., N. S., 1098; Cohen v. La Canada W. Co., 151 Cal. 680, 91 Pac. 584, 11 L. R. A., N. S., 752. See Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. 755, *dictum*.

[19] 154 Cal. 428, 98 Pac. 260.

therefore hold this to be the law of the case with respect to the lands upon which no water has been used by the plaintiff."[20]

(3d ed.)

§ 1156. **Declaratory Decree.**—But the form of relief to protect such purely future use on his own land will not be a prohibitive injunction, but a declaratory decree only. This was decided in Burr v. Maclay R. Co.[21] The court said: "If the adjoining overlying owner does not use the water, the appropriator may take all the regular supply to distant land *until* such landowner is prepared to use it and begins to do so." And as to such use the decree was made in the form given in the note.[22] In Katz v. Walkinshaw,[23] Mr. Justice Shaw had said: "If a party makes no use of the water on his own land or elsewhere, he should not be allowed to enjoin its use by another who draws it out or intercepts it, or to whom it may go by percolation, although, perhaps, he may have a right to a decree settling his right to use it when necessary on his land, if a proper case is made."

[20] See, also, Barclay v. Abraham, 121 Iowa, 619, 100 Am. St. Rep. 365, 96 N. W. 1080, 64 L. R. A. 255.

[21] 154 Cal. 428, 98 Pac. 260.

[22] "Provided, however, that in no event shall the defendant be allowed to take of the waters in the strata pierced by its wells a quantity greater than is supplied thereto from the average annual rainfall upon the watershed contributing thereto or from other sources; nor shall it be allowed to take therefrom a quantity that will reduce the water level in plaintiff's wells, during the periods when the plaintiff is herein given the right to pump therefrom, to such an extent that the plaintiff, with pumps operating at the depth of his present pumps and with equal capacity, will be unable to obtain therefrom enough water to properly irrigate his said block 191 during such period, not exceeding the quantity hereinbefore stated.

"It is further adjudged and declared that the plaintiff, as the owner of said blocks 153 and 190, has the right to take and use of the said waters underlying said blocks, respectively, a sufficient quantity for irrigation and other uses thereon, or his due share, in case there is not enough for all equally entitled therefrom, at such reasonable times as it may be necessary and convenient to do so, and that such right is parcel of said lands; that he may take such water through and by means of wells situated thereon, and that he must, when he desires to use the same, give the defendant ten days' notice of the time or times which he will begin such use, and the defendant must thereupon at such times cease pumping its wells for a sufficient time to allow plaintiff to obtain enough water for one irrigation of so much of the particular block as may then require irrigation; that the continued pumping of said water by said defendant, as herein permitted, shall not be deemed adverse to the rights of plaintiff herein declared, whether such rights are or are not used by plaintiff, and that defendant be forever enjoined from asserting or claiming rights in such water paramount to those of plaintiff herein declared. As thus modified, the judgment shall stand affirmed."

[23] 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 633, 74 Pac. 766, 64 L. R. A. 236.

This is in effect a decree *in personam*, quieting title to plaintiff's right of future use, but allowing defendant's distant use until plaintiff himself seeks to use the water. It was held that nonuse does not bar the right, but only the injunction, and an overlying landowner, though not using the percolating water, may invoke the aid of a court of equity to declare his right of local use against a taking for distant use. He will get a declaratory decree, though not an injunction. A similar tendency in the common law of riparian rights has been elsewhere noted.[24]

(3d ed.)

§ **1157. Distant Use of Surplus.**—Where the distant use will not interfere with any use by plaintiff of his land, even in the future, nor in any way impair its value, then the distant use does him no wrong, and is not actionable by him.

In Cohen v. La Canada Water Co.[25] the court said: "Where, however, there can be no injury worked to such adjoining owners by the taking and use elsewhere of such waters, no limitations should be placed upon the right of one developing them as to their use." And so injunctions are denied in such cases.[1] So it is held in Newport v. Temescal Co. that the owner of worthless land is allowed no cause of complaint.[2]

So also as to the owner of good land who shows no capacity or ability for prospective use of the diverted surplus; that is, where such possible damage appears but only in part. The diversion for distant use will be wrongful only in part. Thus in Burr v. Maclay R. Co.,[3] as to such of plaintiff's land as was actually using water, the taking by defendant for distant land was enjoined only for

[24] *Supra*, secs. 802, 831.

[25] Second appeal, 151 Cal. 680, 91 Pac. 584, 11 L. R. A., N. S., 752.

[1] "If the acts of the defendants do not damage the plaintiff and do not diminish the water which would naturally flow to its place of diversion, it is immaterial whether the pipe-line diversion was made before or after the inception of the plaintiff's appropriation." Mentone Irr. Co. v. Redlands Irr. Co. (1909), 155 Cal. 323, 100 Pac. 1082, 22 L. R. A., N. S., 382. In another case: "Another well was bored by him within the five-year period. The court finds that the water flowing from it was very small. In order to make a case for an injunction it was necessary for the plaintiff to show substantial injury. She introduced no evidence of the quantity discharged from this well, resting it upon the testimony of the defendant that it was very small, as the court found. In support of the finding and judgment we will presume that the quantity was negligible and the injury to the plaintiff therefrom too slight to justify an injunction." Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748.

[2] Newport v. Temescal W. Co., 149 Cal. 531, 87 Pac. 372, 6 L. R. A., N. S., 1098.

[3] 154 Cal. 428, 98 Pac. 260.

six days out of each month, because only to that extent could it damage plaintiff in the use of his land now or in the future, it being already under full cultivation, and there being a surplus over the fullest possibilities of his land. In this case, in considering what would constitute such a surplus, a lowering of water level from nine feet below the surface to thirty feet, a total of twenty-one feet, making the use of existing pumps impossible, was held improper.[4]

The court said in the Burr case: "Nor shall it be allowed to take therefrom a quantity that will reduce the water level in plaintiff's wells, during the periods when the plaintiff is herein given the right to pump therefrom, to such an extent that the plaintiff, with pumps operating at the depth of his present pumps, and with equal capacity, will be unable to obtain therefrom enough water to properly irrigate his said block 191," and in general terms it was held that "in no event shall the defendant be allowed to take of the waters in the strata pierced by its wells a quantity greater than is supplied thereto from the average annual rainfall upon the watershed contributing thereto, and from other sources," and "if the quantity taken therefrom exceeds the average annual amount contributed thereto, the underground store will be gradually depleted and eventually exhausted. This should not be permitted"; and that it should be the ultimate desire to limit the collective amounts taken by all consumers in the region (whether parties to this suit or not) "to a quantity, as near as may be, equal to the average constant supply from the rainfall."

It is emphatically held in Miller v. Bay Cities Co.[5] that the distant alien taker has the burden of proving all these things; and this must necessarily be so, for otherwise the small farmer would be helpless (the difficulties of conducting the necessary geological and engineering campaign to get the above evidence, and the expense of it, would, if put upon the plaintiff, eat up most small farms before the case could get to trial).

[4] See, also, Willis v. City of Perry, 92 Iowa, 297, 60 N. W. 728, 26 L. R. A. 124, holding wrongful a lowering of water plane seventy-five feet so as to make the water inaccessible at any expense that would be reasonable under the circumstances presented; Erickson v. Crookston etc. Co., 105 Minn. 182, 117 N. W. 435, 17 L. R. A., N. S., 650, holding that lowering water level fifty feet so as to prevent hand-pumping is not alone ground for injunction; Newport v. Temescal W. Co., 149 Cal. 531, 87 Pac. 1072, 6 L. R. A., N. S., 1098 (lowering of ten feet not alone wrongful).

[5] 157 Cal. 256, 107 Pac. 115, 27 L. R. A., N. S., 772. Accord, Perry v. Calkins (Cal.), 113 Pac. 136.

(3d ed.)

§ 1158. Same—Not an Absolute "Appropriation."—The taking for the remaining days which was allowed in the Burr case was there called an "appropriation of a surplus." However, it would seem a negative matter rather than a positive *right*, merely deciding that this plaintiff was not in a position to be damaged by it. It was only a matter between these two parties, and should a number of neighbors join in bringing suit under the same conditions as this plaintiff, and join all takers as parties to the suit, it would seem that the distant user would be further restricted in the favor of these other landowners also, until finally no surplus would remain. The distant taking is defeasible at the suit of some other landowner situated more adversely to it, or at the suit of a sufficient number of landowners joining against it, and hence not a positive *right*. To be an "appropriation," as that term is used in the law of streams, it would have to be a freehold water-right, good against the world, such as, upon streams in California, can only be acquired upon public lands, and such as the distant diversion in the present matter does not appear to be.[6]

(3d ed.)

§ 1159. Distant Use by Both Parties.—Where neither party seeks use on his own land, but both for distant lands, a question is raised already considered at length in another connection.[7] The taking by both is defeasible at suit of an injured overlying landowner or by a later use by him on his own land (or by suit or use by a sufficient number of overlying landowners), and hence is not an indefeasible "appropriation" in the general sense of that word denoting a permanent freehold estate.

As to the two distant takers between themselves alone, however (and until some or sufficient overlying landowners present opposition), there are two possible solutions of any controversy. One is that the first taker shall, as between the two, be protected. This is the view of Mr. Justice Shaw.[8] The other possible view is that

[6] See *supra*, sec. 831, where the same point is discussed under the law of riparian rights. See, also, *supra*, secs. 246, 626 et seq., regarding appropriations of streams flowing over private land.

[7] See *supra*, sec. 834.

[8] Saying in Katz v. Walkinshaw, 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236: "The principles which, before the adoption of the Civil Code, were applied to protect appropriations and possessory rights in visible streams, will, in general, be found applicable to such appropriators of percolating waters, either for public or private use, on distant lands, and will suffice

neither may waste the water,[9] but that otherwise they be left to the law of *damnum absque injuria*. Which will be the rule has not, however, been decided, for in the nearest case to such a situation upon its facts (Montecito W. Co. v. Santa Barbara),[10] Mr. Justice Henshaw said: "First, it should be noted as applicable to all these appeals that this case is *radically different* from that of Katz v. Walkinshaw. Here no question arises as to the use or the right of use, or the apportionment of seepage or percolating waters by and between the owners of the overlying lands. . . . . Each one of the parties to this action is carrying the water to alien soil," etc. And he further said that such a case is not within the principle of nor covered by Katz v. Walkinshaw, which concerned only the use of one's own land.

The question is not one of great practical importance, since no case (except, casually, the Montecito case) has yet actually involved it as to percolating water, and it is equally an unusual point (aside from public land) under the law of riparian rights on streams.[11]

for their protection as against other appropriators. Such rights are usufructuary only, and the first taker who with diligence puts the water in use will have the better right."

[9] See Pence v. Carney, 58 W. Va. 296, 112 Am. St. Rep. 963, 52 S. E. 702, 6 L. R. A., N. S., 266; Stillwater W. Co. v. Farmer, 89 Minn. 58, 99 Am. St. Rep. 541, 93 N. W. 907, 60 L. R. A. 875; Merrick W. Co. v. Brooklyn, 32 App. Div. 454, 53 N. Y. Supp. 10.

[10] 144 Cal. 578, 77 Pac. 1113.

[11] *Supra*, sec. 246, appropriation on private land; and sec. 834, nonriparian use by both parties.

§§ *1160–1168. (Blank numbers.)*

CHAPTER 48.

LOSS OF RIGHT, PROCEDURE, AND MISCELLANEOUS MATTERS.

§ 1169. Nonuse.
§ 1170. Prescription.
§ 1171. Public use estoppel.
§ 1172. Contracts concerning underground water.
§ 1173. Evidence, decrees, etc.
§ 1174. Conclusion.
§ 1175. Same.
§§ 1176–1182. (Blank numbers.)

(3d ed.)

§ **1169. Nonuse.**—It is definitely settled by Hudson v. Dailey[1] that nonuse does not bar a landowner's right to percolating water, and by Burr v. Maclay R. Co.[2] that it only affects his remedy. He will, during nonuse, be entitled only to a declaratory decree (and not to a prohibitive injunction) against distant use (or excessive local use) by another; but his right remains to begin his use on his own land whenever he will, without being subordinated to any other person on the ground that such other person used the water first.

(3d ed.)

§ **1170. Prescription.**—Prescriptive rights to ground-water could not be obtained under the old rule.[3] It has been decided that a prescriptive right may be acquired under the new rule.[4] In Hudson v. Dailey, the defendant Currier had diverted the water of a creek continuously and adversely to the plaintiff, under claim of right, and used it on his land for many years before the suit was begun, by means of a dam and ditch. The flow of the creek decreased, and being unable to obtain therefrom the waters he needed, he put down seven wells in the bed of the creek, from three

[1] 156 Cal. 617, 105 Pac. 748.

[2] 154 Cal. 428, 98 Pac. 260.

[3] Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299; Chasemore v. Richards (1859), 7 H. L. Cas. 387, 11 Eng. Reprint, 140.

[4] Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748. See, also, Katz v. Walkinshaw, 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, *dictum;* Burr v. Maclay etc. R. Co., 154 Cal. 277, 98 Pac. 260, *dictum.*

of which he obtained water equal to the quantity to which he had previously obtained the right by such adverse use. These wells were sunk more than five years before the action was begun. The evidence showed that the plaintiff knew of such use and knew that the flow in the creek immediately decreased. By reasonable inquiry she could have ascertained that the decrease was caused by the wells. Under these circumstances the action was held barred. The court said: "There is no foundation for the proposition that the statute of limitations would not begin to run in favor of Currier, with respect to his right to maintain wells, until the extraction of water by his wells had begun to diminish the flow at the plaintiff's dam. The evidence shows that the effect was perceptible at the dam immediately and that the plaintiff had knowledge of the flow from the wells and the use thereof by Currier from the beginning. This was sufficient to charge her with notice that the tendency of the diversion of the flow at those wells would be to reduce the amount in the stream below and to start the statute of limitations running."[5]

Lower use on a stream is not adverse to the right of a landowner (in the upper part of the valley) to the reasonable use, on his own land, of percolations, though immediately tributary to the stream; for the rule in that respect is not different from the rule of riparian rights.[6]

(3d ed.)

§ 1171. **Public Use Estoppel.**—Upon a principle based partly upon equitable rules, called "estoppel" (though seemingly more properly a combination of laches and the balance of convenience in favor of the public as defenses to injunctions in equity), an injunction will be refused against a *public service company* having the power of eminent domain, where the water has been taken by the company to supply a community dependent upon it, and the plaintiff stood by while this was being accomplished, having cause to believe that it would affect his own supply.[7] In so far as the

[5] Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748.

[6] Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748. See *supra*, secs. 861, 863, riparian rights.

[7] Katz v. Walkinshaw, 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236; Newport v. Temescal W. Co., 149 Cal. 531, 87 Pac. 372, 6 L. R. A., N. S., 1098; Miller v. Madera Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391; Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. 115, 27 L. R. A., N. S., 772; Barton v. Riverside W. Co., 155 Cal. 509, 101 Pac. 790, 23 L. R. A., N. S., 317; Crescent Canal Co. v. Montgomery, 143 Cal. 252, 76 Pac. 1032, 65 L. R. A. 943.

rule only bars the injunction, but leaves the action at law for damages, it does not seem an estoppel (which would bar a right),[8] but rests upon equitable defenses to injunction only; in which connection it has been considered in chief in another place.[9]

The case now establishing the rule for percolating waters is Barton v. Riverside W. Co.[10] In this case the Riverside Water Company is, and for many years has been, engaged in the public service of distributing water to the community of Riverside for irrigation and other purposes. Originally the water was all taken from Warm Creek, a stream rising by reason of hydraulic pressure in the ground-water of the underlying strata. Prolonged drought and additional diversions by others caused the creek to decrease. Continuing in the words of the court:

"This decrease made it necessary for the Riverside Water Company, in order to supply those dependent upon it, to find means of obtaining more water. For that purpose and soon after the decrease became apparent, it began putting down artesian wells in the basin, and it has ever since continued to do so as its needs required, not with the intent to increase its diversion from the basin, but to keep it up to the original quantity. The evidence shows that this new method of securing the water was in use at least as far back as the year 1895. In 1899 and 1900, owing to the excessive drought aforesaid and additional diversions by others, additional wells were bored by this company, and it is these wells against which the chief complaint is made, as against this defendant. The wells are deep and the expense of boring them must have been considerable. There was an absolute necessity for more water to serve the public use. The fact that the wells were being bored and that the water obtained thereby was taken to Riverside to supply the previous use was notorious. The fact that these diversions would decrease the common supply of all the plaintiffs was obvious and must have been known to each of them. The complaint alleges that the diversions of all the defendants by means of wells had been going on continuously for at least two years before the action was begun. The complaint was filed on June 4, 1904. It is not seriously claimed that any of the plaintiffs were ignorant of these facts. Most of them, as witnesses, testified to knowledge thereof, many of them declaring that the wells of this company, bored in the

8 *Supra*, sec. 593 et seq.

9 *Supra*, secs. 616, 651.

10 (1909) 155 Cal. 509, 101 Pac. 790, 23 L. R. A., N. S., 317.

years 1899 and 1900, immediately affected their own wells. No objection or protest against the boring of these wells by the Riverside Water Company was ever made by any of the plaintiffs. The first hint of any claim that these diversions were made without right on the part of the respective defendants was manifested by the beginning of this action. So far as this company is concerned, the case comes within the rule established in Fresno etc. Co. v. Southern Pacific Co.,[11] and followed in Southern C. R. Co. v. Slauson [12] and Crescent Canal Co. v. Montgomery.[13] This rule, briefly stated, is that where one whose property is taken for a public use has stood by without objection, knowing that it was so taken and applied, and has allowed the public use to be instituted and carried on at great expense, and has permitted the people benefited thereby to adapt themselves to the new conditions and avail themselves of the conveniences thereby afforded, he cannot thereafter maintain an action to enjoin the continuance of such public use or to recover possession of the property so taken, but will be relegated to an action for damages. The rule was mentioned in Katz v. Walkinshaw,[14] a case involving the waters of this basin, where the court, evidently referring to cases such as that here presented and avowedly intending to suggest a rule of decision in such cases, said: 'Where the complainant has stood by while the development was made for public use, and has suffered it to proceed at large expense to successful operation, having reasonable cause to believe it would affect his own water supply, the injunction should be refused.' . . . . Plaintiffs knew of these diversions of water from the basin and either knew, or had good cause to believe, that the water was being taken from their own source of supply and that such taking tended to exhaust the supply, that it was carried away for use outside the basin in a community depending thereon and which, we may presume, had settled and established itself there in reliance upon the continuance of that supply,[15] that great expense in the meantime had been incurred in maintaining the supply and the works necessary for its distribution, and that, so knowing, they stood by for at least nine years after the well boring had begun, and, by their own admission, two years after it was

[11] 135 Cal. 207, 67 Pac. 773.

[12] 138 Cal. 342, 94 Am. St. Rep. 58, 71 Pac. 352.

[13] 143 Cal. 252, 76 Pac. 1032, 65 L. R. A. 940.

[14] 141 Cal., at 136, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236.

[15] Citing Crescent C. Co. v. Montgomery, *supra*.

completed, and uttered no word of complaint or protest. The injunction against this defendant was properly refused on this ground."

In a later case the principle was also urged, but held inapplicable upon the facts, saying: "There can be no question but that the plaintiff brought this action for an injunction to restrain this particular diversion of the waters as soon as it reasonably appeared that the proposed diversion by the pump and appliances of appellants as installed and operated would affect the supply of water in his artesian stratum. So the appellants were not entitled to be secured in the operation of their plant and their diversion of water by that means on the ground that the plaintiff stood by and permitted the development of water to be made to successful operation, having reasonable cause to believe that it would affect his water supply."[16]

(3d ed.)

§ 1172. Contracts Concerning Underground Water.—Under the new rule, grants and contracts concerning underground water are binding upon the parties thereto and their privies or successors in interest, whatever might be their force against noncontracting landowners.[17] The rule in this respect is the same under the old rule, at least as to all successors in interest having notice of the grant.[18] How far grants can have force against noncontracting overlying owners involves the same question as in the law of riparian rights.[19]

Contracts may be made for "development" of underground water. As this word is used in contracts, development work is not merely the opening of new channels for the outflow of underground stores of water by the propulsion of the forces of nature. While pumping is the forcible abstraction of these natural stores by foreign and artificial work, the term "development" as applied to obtaining a water supply includes it. If the driving of tunnels or making of cuts is the development of water, as (it is held) it must be conceded it is, there is no good reason

[16] Miller v. Bay Cities W. Co. (1910), 157 Cal. 256, 107 Pac. 115, 27 L. R. A., N. S., 792 (citing Katz v. Walkinshaw, *supra*).

[17] Burr v. Maclay R. Co., 154 Cal. 428, 98 Pac. 260, where a reservation of thirty inches by a common grantor was upheld against all holding under him. As to its force against noncontracting landowners, compare *supra*, sec. 847, grant of riparian rights.

[18] Charon v. Clark, 50 Wash. 191, 126 Am. St. Rep. 896, 96 Pac. 1040, 17 L. R. A., N. S., 647; 3 Farnham on Waters, sec. 943.

[19] *Supra*, sec. 847.

(it is held) why the installation of a pump plant is not equally such "development."[20]

A reservation in deeds to tracts of land of "all artesian water that may be developed on said land and not used thereon" does not extend to artesian water necessary for use on the land from which it is obtained, nor to any water except artesian water, and reserves no right to enter the land to develop artesian water.[21]

(3d ed.)

§ 1173. **Evidence, Decrees, etc.**—A court of equity, acting *in personam,* may govern the future acts of the parties, and mold its decree to the interest of justice. "The court unquestionably has power to make reasonable regulations for the use of such water by the respective parties, fixing the times when each may take it and the quantity to be taken, provided they be adequate to protect the person having the paramount right in the substantial enjoyment of that right, and to prevent its ultimate destruction."[22]

Whether several landowners can join as plaintiffs for injunction was left open in one case.[23] It would seem that they not only can but must, in order to enjoin the diversion to distant land of what would be a surplus over the needs of any one of them, but would not be a surplus over the needs of all collectively.[24]

The measure of damages has been held to be the loss in rental value of the land and not the value of producible crops, though the value of crops is admissible in evidence of the value of the land.[25]

Evidence or findings upon specific underground geological conditions are immaterial, where it clearly appears that the water supply has been affected by the acts complained of.[1] In a case

20 Garvey W. Co. v. Huntington etc. Co. (1908), 154 Cal. 232, 97 Pac. 428. See, also, Vineland Irr. Dist. v. Azusa Irr. Co., 126 Cal. 486, 58 Pac. 1057, 46 L. R. A. 820; Roberts v. Crafts, 141 Cal. 243, 74 Pac. 281; Painter v. Pasadena Co., 91 Cal. 74, 27 Pac. 539.

21 Burr v. Maclay R. Co., 154 Cal. 428, 98 Pac. 260.

22 Burr v. Maclay R. Co., 154 Cal. 428, 98 Pac. 260. See *supra,* sec. 1156, declaratory decree.

23 Barton v. Riverside W. Co. (1909), 155 Cal. 509, 101 Pac. 790, 23 L. R. A., N. S., 331.

24 See *supra,* sec. 626 et seq., joinder of parties. Also, secs. 831 and 1158, "appropriations of surplus."

25 Reisert v. New York, 69 App. Div. 302, 74 N. Y. Supp. 673; Forbell v. New York, 164 N. Y. 522, 79 Am. St. Rep. 666, 58 N. E. 644, 51 L. R. A. 695. See, also, Dexter v. Providence etc. Co. (Story, J.), Fed. Cas. No. 3864, 1 Story, 387. See, generally, *supra,* sec. 638, regarding measure of damages.

1 Cohen v. La Canada W. Co., 151 Cal. 680, 91 Pac. 584, 11 L. R. A., N. S., 752.

where defendant contended that there were two separate underground strata, it was held: "As the findings also, in substance, declare that the pumping of the defendants does, to a material extent, decrease the amount of water which the plaintiff is able to divert from the creek and which she needs for the irrigation of her land, the finding as to the lower strata is immaterial. If the pumping by the defendants constituted an unlawful diversion of water to which plaintiff was entitled, it would be no defense that they also took other water from another source."[2]

If, underlying a valley, there is an impervious clay layer separating the lower gravels from the upper, a single acre where this clay blanket did not continuously exist would make an opening equivalent to an immense well, through which the water would pass from one stratum to the other.[3]

What a subterranean stream must be in order to bring it within the law of riparian rights is a question of law.[4] Experts learned in geology may give their theories as to the manner in which nature created or developed a given physical condition, and they do not, in so doing, invade the domain of the law.[5]

In an action for apportionment of water between local users upon their own lands, pleading and evidence must show all the essential facts and circumstances as to what would be reasonable for each. "There is no attempt to present a case of excessive use by a defendant entitled to share in a common supply, or to obtain a decree apportioning the waters of the valley among the parties. The evidence does not supply the data necessary to apportion the water to which each party is entitled. If these defendants are entitled to a reasonable share of this underground water, the plaintiff has shown no case against them."[6]

A well produces a "cone of depression"; a gallery produces an inclined plane of depression.[7]

[2] Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748.

[3] Hudson v. Dailey, *supra*. In this case and Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. 755, and Miller v. Bay Cities W. Co. (1910), 157 Cal. 256, 107 Pac. 115, 27 L. R. A., N. S., 772, the court found against the existence of a single unfirm impervious clay blanket separating the gravels.

[4] Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. 755.

[5] Los Angeles v. Hunter, *supra*.

[6] Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748. See *supra*, sec. 751 et seq.

[7] Strang v. New York, 127 N. Y. Supp. 231, where the depression was found to end and the normal to be restored three thousand five hundred feet from the wells and galleries.

Some other points of procedure in percolating water are included in the general chapter upon procedure elsewhere; for in most cases only general rules of procedure are involved.[8]

(3d ed.)

§ 1174. **Conclusion.**—The supreme court of the United States recently said:[9] "Indeed, the extent to which seepage operates in adding to the flow of a stream, or in distributing water through lands adjacent to those upon which water is poured, is something proof of which must necessarily be almost impossible. . . . . The underground movement of water will always be a problem of uncertainty."[10]

The difficulty was so great in determining the exact amount of diminution that the trial court in Montecito etc. Co. v. Santa Barbara[11] attempted to shirk the duty and to leave the matter out of its judgment, relegating the parties to future litigation. The court must make a specific finding of the amount of diminution caused.[12] The difficulty will be specially great in mining cases, if mining is held no justification. When it comes to showing specifically an underground connection causing the loss of percolating water from a well, it is likely that we shall have the same elaborate and indefinite discussions that have surrounded the mining suits to protect extralateral rights to a vein; to show an underground geological connection between the ore in one's shaft and the ore in distant works of a trespasser has always been a difficult undertaking. In one case already the court complained that the evidence was highly technical, and enough to fill a volume of the reports.[13] Nevertheless, in all branches of the law of waters,

8 *Supra*, sec. 625 et seq.

9 Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. Rep. 655, 51 L. Ed. 956, Brewer, J.

10 "There will always be great difficulty in fixing a line beyond which the water in the sands and gravels over which a stream flows, and which supply or uphold the stream, ceases to be a part thereof and becomes what is called 'percolating water.'" Mr. Justice Shaw in Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748.

11 144 Cal. 578, 77 Pac. 1113.

12 Montecito W. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113; McClintock v. Hudson, 141 Cal. 275, 74 Pac. 849; Cohen v. La Canada Water Co., 142 Cal. 437, 76 Pac. 47; Verdugo W. Co. v. Verdugo (1908), 152 Cal. 655, 93 Pac. 1021; Pomona W. Co. v. San Antonio W. Co., 152 Cal. 618, 93 Pac. 881.

13 Newport v. Temescal etc. Co., 149 Cal. 531, 87 Pac. 372, 6 L. R. A., N. S., 1098. "The limits of a judicial opinion, however, will in many cases preclude a consideration in detail of findings." Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. 115, 27 L. R. A., N. S., 772.

difficulties arise, and the courts must deal with them, however great their intrinsic difficulty.[14]

The "*cujus est solum*" doctrine was easily applied but not always just. The new rule is to do justice, and to take into consideration the needs of all. It is preferable if kept free from the intricacies and complications which will arise from over-much specialization of rules, or too close an attempt to follow the geological variations of formation which will be met with. For percolating water differs through facts of nature from surface streams. Percolating water must always remain a hidden. invisible, secret thing. Where it is and how it moves in any given locality must always be more a matter of inference than of proof, in which conjecture must exceed knowledge. It is doubtful whether any very specialized system of law, beyond the general principle of reasonable use of one's own land, can fit upon so hidden and formless a thing.[15] In one recent instance in Minnesota a case was tried twice, and in sending it down for still a third trial, the supreme court said: "It would seem that the subject was still in the experimental stage, and that it may require some time to properly test the capacity of the water strata and demonstrate to what extent the general supply and the convenience of private well-owners will be affected by the company's plans. During such period it is possible that the differences of the parties may be satisfactorily adjusted by a modified injunctional order, as suggested by appellant. As the case is presented upon this record, a new trial is unavoidable for the reasons stated; and, inasmuch as new or different facts may be then developed, any attempt at this time to state how the law should be applied upon a given state of facts would tend to confuse rather than assist."[16]

[14] Butte etc. Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769, 4 Morr. Min. Rep. 552; Bear River etc. Co. v. New York, 8 Cal. 327, 68 Am. Dec. 325, 4 Morr. Min. Rep. 526. In Katz v. Walkinshaw, Mr. Justice Shaw said: "The objection that this rule of correlative rights will throw upon the court a duty impossible of performance—that of apportioning an insufficient supply of water among a large number of users—is largely conjectural. No doubt cases can be imagined where the task would be extremely difficult, but, if the rule is the only just one—as we think has been shown—the difficulty in its application in extreme cases is not a sufficient reason for abandoning it and leaving property without any protection from the law."

[15] Cf. Western etc. Co. v. Martin (1909), 110 Md. 554, 73 Atl. 267.

[16] Erickson v. Crookston etc. Co., 104 Minn. 182, 117 N. W. 435, 17 L. R. A., N. S., 650.

(3d ed.)

§ 1175. **Same.**—As a final conclusion upon the state of the California law of percolating water, we have now (with the exception of rights by grant, condemnation or prescription or appropriations of water upon public land) one general law for all waters, whether they be running or percolating. All waters of a given region are, if connected in their natural presence and movement, a common supply for all landowners in the region who have access to it by their natural situation, each having an equal right to make a reasonable use of his own land against all his neighbors, but no exclusive right existing in any one of them, nor any right to take the water for use off his own land to the detriment of the land or water supply of a neighbor. Whether the water is taken by a well from percolations or by a ditch from a stream becomes immaterial. Water is now held by the people in common in California in the fullest possible sense of the word.

§§ *1176–1182. (Blank numbers.)*

PART VI.

ADMINISTRATIVE SYSTEM, AND DETERMINATION OF RIGHTS, UNDER STATE WATER CODES AND STATUTES.

CHAPTER 49.

THE ADMINISTRATIVE SYSTEM.

§ 1183. Introductory.
§ 1184. Legislation.
§ 1185. Same.
§ 1186. Supervision of State.
§ 1187. Intermediate subdivisions.
§ 1188. Primary subdivisions.
§ 1189. Police regulations.
§ 1190. Issuing new permits, determining old rights, and controlling changes.
§ 1191. Jurisdiction of officers usually confined to natural resources.
§ 1192. Powers of water officials are administrative and not judicial.
§ 1193. Vested rights protected.
§ 1194. Decisions of water officials are not conclusive upon the courts.
§ 1195. Duties of water officials.
§ 1196. Actions by and against officials.
§ 1197. Pay of water officials.
§ 1198. Water commissioners and State Engineer in California and other States that have not adopted water codes.
§ 1199. Comment of United States Department of Agriculture.
§§ 1200-1205. (Blank numbers.)

(3d ed.)

§ 1183. In addition to this chapter, reference should also be made to Part VII, dealing with the Distribution of Water by public service agencies.

(3d ed.)

§ 1184. **Legislation.**—Wyoming legislation has developed a system of State water supervision and administration which was

adopted in other States, and now forms the basis of the water code system in this respect.[1] For these statutory provisions reference must be made to the statutes in a later part of this book. In one Wyoming case it is said: "In the progress of our legislation in respect to the use of water for irrigation and other beneficial purposes, the significant feature of the changes and additions from time to time has been the principle of centralized public control and regulation. One can hardly fail to be impressed with the gradual tendency exhibited in the various acts toward the greater effectiveness of public supervision."[2]

The possibility of supervisory legislation is sometimes questioned where there are constitutional provisions declaring waters the property of the public, and that no person shall be denied the right to appropriate, following the Colorado constitution. In Idaho, under such provision, the matter was noticed and left open, saying that the legislature must act only "in such manner that the right to divert and appropriate waters will not be denied."[3] In Colorado this has never been positively passed upon, but there is strong opinion in this State that such provisions prevent supervision in the acquiring of appropriations, or at least prohibit the rejection of applications; and may otherwise restrict supervision. Decisions on analogous provisions are given in the note, seeming against this contention.[4]

1 *Supra*, sec. 124.

2 Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 87 Am. St. Rep. 918, 61 Pac. 258, 50 L. R. A. 747. See Montezuma Co. v. Smithville Co., 218 U. S. 371, 31 Sup. Ct. Rep. 67, 54 L. Ed. 1074. In Idaho it is said (Speer v. Stephenson (1909), 16 Idaho, 707, 102 Pac. 365): "The legislature and also this court recognize the power in the legislature." Likewise in Idaho etc. Co. v. Stephenson (1909), 16 Idaho, 418, 101 Pac. 821, it is said that the State intends to control all public waters, "and prescribes very minutely the steps that must be taken in order to acquire the right." Public supervision (based upon the law of riparian rights, with a free exercise of the power of eminent domain such as, under Clark v. Nash, is now possible in this country also) is the salient feature in the Continental European law of waters to-day. Concerning the French law it has been said: "The indispensability of river-guards must be considered as having been completely demonstrated by experience. The practice of riparian owners and manufacturers making encroachments on the channels of watercourses has, in every instance, developed where there has been no inspection, or where the agents had too extended beats and could not attend properly to their duties. But where guards have been in almost daily communication with the users of the watercourses, regulations have been observed and infringements prevented. An infringement taken at the commencement is generally discontinued on receiving a friendly notice, while suits entered afterward are often uncertain in their results." De Buffon on Agriculture (French), vol. II, p. 134.

3 Speer v. Stephenson (1909), 16 Idaho, 707, 102 Pac. 365.

4 Power to authorize irrigation corporations organized under New Mexico act of February 24, 1887, to take and divert surplus public waters over and above the needs of prior appropriators,

Concerning the general effect of this legislation it has been usually attributed to the police power of the State.

(3d ed.)

§ 1185. **Same.**—All waters are, in States adopting water codes, declared subject to the control of the State for the benefit of the people, though the form of words differs: "The property of the public" or "of the State";[5] or "Dedicated to the use of the people";[6] or "Water for irrigation is a natural want," and the works, therefore, are "Works of internal improvement";[7] or "Are subject to regulation and control by the State";[8] "The use of water for a beneficial purpose is a public use."[9] In the Idaho constitution it is declared that the use of water is a public use, and subject to the regulation and control of the State.[10] Similar provisions exist in most States.

(3d ed.)

§ 1186. **Supervision of State.**—The general supervision over the whole State is placed either in a special board or in the State Engineer. For example, it is in a State Board of Irrigation in Nebraska,[11] consisting of the governor, attorney general, and commissioner of land;[12] a State Board of Irrigation in Nevada, consisting of the governor, attorney general and surveyor general;[13] in a State Board of Control in Wyoming and Oregon consisting of a State Engineer and division superintendents.[14] It is in the State Engineer in Colorado[15] and Utah.[16] In South Dakota, a

was not denied to the legislature of that territory by the proviso in the Desert Land Act of March 3, 1877, 19 Stats. at Large, 377, chapter 107 (U. S. Comp. Stats. 1901, p. 1549), that surplus water on the public domain shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes, subject to existing rights. Gutierres v. Albuquerque etc. Co., 188 U. S. 545, 23 Sup. Ct. Rep. 338, 47 L. Ed. 588. A provision in a constitution that all navigable waters shall forever remain public highways does not interfere with whatever power the State would otherwise have over such waters. Manigault v. Springs, 199 U. S. 473, 26 Sup. Ct. Rep. 127, 50 L. Ed. 274.

5 *Supra*, sec. 170.

6 Colo. Const., art. 16, sec. 5.

7 Neb. Comp. Stats. 1903, 6456, 6473; for which bonds may be voted by townships, Cummings v. Hyatt, 54 Neb. 35, 74 N. W. 411.

8 Nevada Comp. Laws 1900, sec. 354. See *infra*, sec. 1264.

9 Utah Stats. 1905, c. 108, sec. 50; and see Wyo. Const., art. 1, sec. 13. See *infra*, sec. 1264.

10 Idaho Const., art. 15, sec. 1.

11 Comp. Stats. 1903, sec. 6412.

12 *Ibid.*

13 Stats. 1901, p. 72. The State Engineer was added as a member in 1907, p. 30, sec. 21.

14 Wyo. Const., art. 8, sec. 2; Or. Stats. 1909, c. 216, sec. 9.

15 3 M. A. S., 1905 ed., 2447h, 2286c; M. A. S. 2459.

16 Stats. 1905, c. 108, secs. 1–3.

Board of Water Commissioners, composed of the commissioners of the water divisions, with the State Engineer as president.[17] There is in Idaho a State Board of Irrigation consisting of the State Engineer and the three water commissioners; but the functions of this board seem less than in the other States where boards are constituted. They meet once a year, no session exceeding five days.[18] In California, water powers are to be under a Board of Water Power Control, a Conservation Commission, a Public Service Commission, and a Department of Engineering, all of which were created this year (1911).[18a]

In exercising this general supervision, general control may be exercised over all the waters, surveys and inspections made, and general rules and regulations established, and the administration of priorities (as elsewhere determined) provided for.

Where the general control is in a board, an executive officer is also provided having general powers to see to the execution of the orders of the board. This is the State Engineer in Nevada;[19] in Nebraska it is the secretary of the board, also called State Engineer;[20] in Wyoming and Oregon[21] it is the State Engineer, who is the president of the Board of Control.[22] The State Engineer's salary varies.[23]

(3d ed.)

§ **1187. Intermediate Subdivisions.**—The whole State is usually divided into intermediate subdivisions. These are called water or irrigation divisions, and an executive officer is provided for each division. For example, in Colorado they are called irrigation divisions, of which there are five, and the executive of each is called "irrigation division engineer."[24] In Nebraska there are two, called "water divisions," and the executive officer for each is called "under-secretary for the division."[25] In Utah there are five, called "water divisions," and the executive officer for each is called "division superintendent."[1] In Wyoming there are four, called

17 S. D. Stats. 1907, c. 180.

18 Stats. 1903, p. 223, sec. 22. See, also, Stats. 1909, c. 68, p. 326.

18a *Supra*, sec. 125; and *infra*, sec. 1432.

19 Stats. 1903, p. 18, sec. 5.

20 Comp. Stats. 1903, sec. 6425.

21 Laws 1909, c. 216, sec. 8. (Elected by the people.)

22 Wyo. Const., art. 8, sec. 5.

23 In Nevada, $3,600; in Idaho, $2,400; in South Dakota, $2,000; in Utah, $6,000.

24 3 M. A. S., 1905 ed., 2440 et seq. See Colo. Rev. Stats. 1908, secs. 3335–3352.

25 Comp. Stats. 1903, secs. 6409, 6419 et seq.

1 Stats. 1905, c. 108, secs. 26–30. See Stats. 1911, c. 104, p. 145.

"water divisions," and the executive for each, called "division superintendent."[2] The State in Idaho is, by the statute, divided into three water divisions, numbered 1, 2, 3, with one "water commissioner" for each division, to hold office for six years.[3] The division executive has general control over the waters within his division, similar to that of the State Board or State Engineer over the State, and may make rules and regulations for his division, subject to the control of the higher authorities and appeal to them.

(3d ed.)

§ 1188. **Primary Subdivisions.**—The direct primary administration rests in a further and subordinate subdivision of the divisions into districts, with an executive officer for each district. Thus, in Colorado these districts are called "water districts" (called "unincorporated," to distinguish them from irrigation districts based on the Wright Act of California). There are sixty-eight of these established by statute, according to the locations of water supplies.[4] The executive for each is called "water commissioner."[5] In Nebraska the State Board of Irrigation may create water districts as necessity arises, and the executive officer thereof is called "under-assistant for the district."[6] In Nevada, the State Board of Irrigation shall divide the whole State into subdivisions, called "water subdivisions," the executive for each being called "water commissioner."[7] In Utah the State Engineer shall subdivide the divisions into districts as necessity arises, appointing one executive called "supervisor" for each.[8] In Wyoming the State Board of Control may subdivide the divisions into water districts as necessity arises, with one water commissioner for each district.[9] In Idaho the Board of Irrigation shall divide the State into "water districts" from time to time as priorities become adjudicated, with one "water-master" for each, appointed by the water commissioner of the division and holding office for one year; in some cases elected by the appropriators.[10]

2 Const., art. 8, sec. 4; Rev. Stats. 848.

3 Stats. (*supra*), secs. 13–18. See, also, S. D. Stats. 1907, c. 180, sec. 38; Or. Stats. 1909, c. 216, sec. 2.

4 M. A. S. 2310 et seq.

5 M. A. S. 2381, 2384. See Rev. Stats. 1908, secs. 3427–3439.

6 Comp. Stats. 1903, secs. 6441, 6442.

7 Stats. 1901, p. 72. The Statutes of 1907, page 30, section 22, provides for both divisions and districts, before which there was only one subdivision of the State in Nevada, intermediate division being omitted.

8 Stats. 1905, c. 108, sec. 26 et seq. In Statutes of 1911, chapter 104, page 145, called "water commissioner," and to be appointed by the governor.

9 Rev. Stats. 888, 889.

10 Stats. (*supra*), secs. 23, 24. See, also, Laws 1909, c. 166, p. 104.

With the executive of the district lies the direct immediate supervision of the owners, and direct administration and control of the use of the waters, and the enforcement of the rules and regulations of his superiors, subject to appeal to them.

(3d ed.)

§ 1189. **Police Regulations.**—To enable the district executive to perform his duties, owners are required to keep headgates and measuring devices, so that the water may be measured, shut off, and controlled. A failure to maintain such devices is usually punishable criminally,[11] and in some States the water may be shut off until they are put in.[12] Waste of water is usually punishable criminally.[13] In general, obstructing the work of officials or interference with headgates or other apparatus is punishable criminally,[14] and the water officials usually have power to make arrests.[15] Such provisions now exist in most of the Western States.[16]

(3d ed.)

§ 1190. **Issuing New Permits, Determining Old Rights, and Controlling Changes.**—Special parts of the system of administration are separately considered elsewhere in this book, and are merely referred to in this section. These are: The power given to the officials over the making of new appropriations,[17] the power given them to determine existing rights (in a few States),[18] and

11 For example: *Colorado,* Rev. Stats. 1908, secs. 3223, 3244 et seq., 3329; *Nebraska,* Comp. Stats. 1903, secs. 6443, 6445; *Nevada,* Stats. 1909, p. 86; *Oregon,* Stats. 1909, c. 216, sec. 55; *South Dakota,* Stats. 1907, c. 180, sec. 50; *Utah,* Stats. 1901, c. 100, sec. 53. See Johnson v. Sterling etc. Co. (Colo.), 113 Pac. 496, holding (*semble*) that absence of headgate is immaterial if no excess of water is taken.

12 For example: *Colorado,* 3 M. A. S. (1905 ed.), sec. 2286; *Nebraska,* Comp. Stats. 1903, sec. 6443; *Oregon,* Stats. 1909, c. 216, secs. 38, 39; *Utah,* Stats. 1911, c. 104, p. 145, sec. 10; *Wyoming,* Stats. 1901, p. 99.

13 For example: *Colorado,* M. A. S. sec. 2384; *Nebraska,* Comp. Stats. 1903, sec. 6407; *Nevada,* Comp. Laws 1900, secs. 430, 431.

14 For example: *Colorado,* statutes just cited; *Idaho,* Stats. 1907, p. 237; *Nebraska,* Cobbey's Ann. Stats., sec. 6804; Comp. Stats. 1903, secs. 6407, 6443, 6445; *Nevada,* Stats. 1903, p. 18, sec. 20; Stats. 1907, p. 30, sec. 30; Stats. 1909, p. 86; *Oregon,* Stats. 1909, c. 216, secs. 43, 44, 67, 68; *South Dakota,* Stats. 1907, c. 180, sec. 54; *Utah,* Stats. 1905, c. 108, sec. 64; see, also, Stats. 1911, c. 104, p. 145, secs. 9, 10; *Wyoming,* Rev. Stats., secs. 930, 971; Stats. 1901, p. 95.

15 For example: *Colorado,* M. A. S., secs. 2366, 2384, 2386; *Nebraska,* Comp. Stats. 1903, sec. 6443; *Utah,* Stats. 1911, c. 104, p. 145, sec. 9; *Wyoming,* Rev. Stats., sec. 972.

16 The foregoing citation lists are not complete, as reference can readily be made to the statutes of each State in Part VIII below. See, also, sec. 658, *supra.*

17 *Supra,* sec. 408.

18 *Infra,* sec. 1206.

the power placed in them to control changes of point of diversion and of place and purpose of use.[19] The rest of this chapter applies more or less to all these matters.

Comparison should also be made with the new Federal administrative system of the Forest Service.[20]

(3d ed.)

§ 1191. Jurisdiction of Officers Usually Confined to Natural Resources.—As elsewhere set forth, the law of watercourses as a whole is a law of natural streams as natural sources of supply,[21] and appreciating this, the general rule seems to be that the jurisdiction of water officials is over these *natural* resources.[21a] They control the flow of natural streams and the taking of water therefrom, but it would seem (although neither law nor practice is wholly settled) they do not have jurisdiction over the water after it has been diverted and is being distributed in artificial works; that is, they have jurisdiction over the diverting works leading from a stream, but not over the rights of consumers, among themselves, to whom the water is distributed after its diversion. In Colorado this is well settled,[22] and there the law of consumers among themselves, as well as their relation to the owner of the distributing works, is contained in the law of public service considered in Part VII of this book,[23] rather than in the administrative law here given. In Wyoming neither law nor practice seems to be wholly settled in the matter; but the writer understands that the general tendency is to accord with the Colorado law in this respect.

(3d ed.)

§ 1192. Powers of Water Officials are Administrative and not Judicial.—The powers of water officials are held to be primarily ministerial, executive, or administrative, and such *quasi* judicial powers as they incidentally exercise are not such as to make them judicial officers within the constitutional prohibition against conferring judicial power upon executive officers.[24]

19 *Supra*, secs. 506, 509.
20 *Supra*, sec. 430 et seq.
21 *Supra*, c. 4.
21a Compare *supra*, sec. 411.
22 *Infra*, sec. 1195.
23 *Infra*, sec. 1245.
24 Speer v. Stephenson (1909), 16 Idaho, 707, 102 Pac. 365; Idaho etc. Co. v. Stephenson (1909), 16 Idaho, 418, 101 Pac. 821; Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 87 Am. St. Rep. 918, 61 Pac. 258, 50 L. R. A. 747; Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210; Ryan v. Tutty, 13 Wyo. 122, 78 Pac. 661; Crawford Co. v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889; Farmers'

In this regard it has been said of their power over the making of new appropriations: "The relief sought is the cancellation of the permit. No affirmative relief can be demanded or granted. The proceeding is informal. No provision is made for testing the sufficiency of the petition, and no answer is required. Evidence is permitted to be presented by affidavit. The State Engineer is authorized to make an examination, and in rendering his decision may be governed by the examination made. The procedure is entirely different and distinct from that prescribed for actions brought in the courts of the State. The petitioner is not required to allege or prove any injury to himself or his property, or any facts which would constitute an action at law, or entitle the petitioner to relief in equity." [25]

Likewise of the jurisdiction of the officials in States which, as in the next chapter, place in them the determination of existing priorities. In an early Montana case it was held that a statute conferring on commissioners the power to apportion the water of any creek according to the legal rights of the parties is unconstitutional as conferring upon them judicial powers.[1] In Wyoming and Nebraska, however, the contrary has been held because the board acts in advance of any controversy, though the power is *quasi* judicial.[2] In a Nebraska case, referring to the Wyoming system, it is said: "The Wyoming constitution has not provided for a board of irrigation with judicial functions in the sense that it is a judicial tribunal. The duties of the board there, as here, are supervisory and administrative in character, and not judicial. While it may be true that they are given powers of a *quasi* judicial character, this of itself does not constitute them a judicial body, nor does it have the effect of conferring upon administrative bodies the exercise of judicial functions in contravention of constitutional provisions. The Wyoming statute, from which ours is borrowed, has been subjected to judicial construction, and is upheld by the supreme court of that State on the express ground that the powers

Canal Co. v. Frank, 72 Neb. 136, 100 N. W. 286; Boise etc. Co. v. Stewart, 10 Idaho, 38, 77 Pac. 25, 321; Lockwood v. Freeman, 15 Idaho, 395, 98 Pac. 295; City of Pocatello v. Bass, 15 Idaho, 1, 96 Pac. 120; Waha Co. v. Lewiston Co. (Idaho), 158 Fed. 137; Trade etc. Co. v. Fraser, 148 Fed. 587, 79 C. C. A. 37; Boulder etc. Co. v. Hoover (Colo.), 110 Pac. 75.

25 Speer v. Stephenson (1909), 16 Idaho, 707, 102 Pac. 365.

1 Thorp v. Freed, 1 Mont. 651, per Knowles, J., and Thorp v. Woolman, 1 Mont. 168, 8 Morr. Min. Rep. 87. That the powers are judicial, Cleghorn's Appeal, 3 Hawaii, 216.

2 Authorities just cited.

authorized therein are not judicial, but administrative. With this authoritative construction of the statute, and a decision of the very question raised in the case at bar, upon reasoning quite convincing and satisfactory, it would seem that the question should be regarded as at rest."[3]

(3d ed.)

§ **1193. Vested Rights Protected.**—As is true of administrative officers generally, irrigation or water officials cannot authorize acts injuring existing owners; their action is invalid where it has that effect.[4] They cannot cut down the vested rights of prior appropriators or put them to unnecessary inconvenience to suit the benefit of subsequent appropriators.[5] Their authorization cannot legalize a wrong upon existing claimants,[6] nor abridge their rights.[7]

Thus, in connection with the making of appropriations, a permit from the State Engineer is of no avail against existing owners

[3] Crawford v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889, citing Farm Inv. Co. v. Carpenter, *supra*.

[4] *Federal.*—Trade Dollar Co. v. Fraser (Idaho), 148 Fed. 587, 79 C. C. A. 37; Waha Co. v. Lewiston Co. (Idaho), 158 Fed. 137.

California.—Pico v. Colimas, 32 Cal. 255; Daley v. Cox, 48 Cal. 127; Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Charnock v. Rose, 70 Cal. 189, 11 Pac. 625; Lakeside D. Co. v. Crane, 80 Cal. 181, 22 Pac. 76; County of Sutter v. Nichols (1908), 152 Cal. 688, 93 Pac. 872, 15 L. R. A., N. S., 616, 14 Ann. Cas. 900. The California water power act of 1911, c. 406, provides in sec. 14 that permits issued by the board of control shall not impair or affect any rights already vested.

Colorado.—Consider, for example, McLean v. Farmers' etc. Co., 44 Colo. 184, 98 Pac. 16 (*semble*); Cache La Poudre etc. Co. v. Hawley, 43 Colo. 32, 95 Pac. 317 (*semble*); Boulder etc. Co. v. Hoover (Colo.), 110 Pac. 75.

Idaho.—City of Pocatello v. Bass, 15 Idaho, 1, 96 Pac. 120; Lockwood v. Freeman, 15 Idaho, 395, 98 Pac. 295; Idaho etc. Co. v. Stephenson, 16 Idaho, 418, 101 Pac. 821; Speer v. Stephenson, 16 Idaho, 707, 102 Pac. 365. See, also, Bear Lake Co. v. Budge, 9 Idaho, 703, 108 Am. St. Rep. 179, 75 Pac. 614; Boise etc. Co. v. Stewart, 10 Idaho, 38, 77 Pac. 25, 321.

Montana.—Thorp v. Freed, 1 Mont. 651; Thorp v. Woolman, 1 Mont. 168, 8 Morr. Min. Rep. 87.

Nebraska.—Farmers' etc. Co. v. Cozad etc. Co., 65 Neb. 3, 90 N. W. 951. But see cases hereafter cited.

Nevada.—Compare Nev. Stats. 1907, p. 30, sec. 25, providing that a failure to protest proceedings before the State Engineer shall in no way affect existing rights.

Wyoming.—Farm. Inv. Co. v. Carpenter, 9 Wyo. 110, 87 Am. St. Rep. 918, 61 Pac. 258, 50 L. R. A. 747; Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210; Ryan v. Tutty, 13 Wyo. 122, 78 Pac. 661. Compare Whalon v. North Platte etc. Co., 11 Wyo. 313, 71 Pac. 995.

Miscellaneous.—Cleghorn's Appeal, 3 Hawaii, 216; Wilfong v. Bailey, 3 Hawaii, 479; Davis v. Afong, 5 Hawaii, 216; Waikulu etc. Co. v. Cornwell, 10 Hawaii, 476.

[5] Farmers' etc. Co. v. Cozad etc. Co., 65 Neb. 3, 90 N. W. 951; Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 87 Am. St. Rep. 918, 61 Pac. 258, 50 L. R. A. 747; Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210.

[6] Lakeside Ditch Co. v. Crane, 80 Cal. 181, 22 Pac. 76.

[7] Charnock v. Rose, 70 Cal. 189, 11 Pac. 625.

with whose rights it conflicts. In an Idaho case it is laid down: "Counsel for appellants appear to lay special stress upon the fact that the appellants received a license from the State Engineer to appropriate water from said stream. There is nothing in that contention whatever, as it is clearly shown that all of the waters of said creek had been appropriated by the respondent and his grantors long before any license was applied for by the appellants from the State Engineer. The State Engineer has no authority to deprive a prior appropriator of water from any stream in this State, and give it to any other person. Vested rights cannot thus be taken away."[8] In another Idaho case the State Engineer issued a permit to appropriate a spring. It was shown in court that the spring had already been appropriated by another before the passage of the statute requiring application to the State Engineer. The permit-holder was enjoined from interfering with the water, and the right thereto was adjudicated to be in the other claimant.[9] In a New Mexico case it is held that the State Engineer cannot authorize entry upon private land, and that permits granted in excess of his authority are invalid.[10] The Nevada statute says expressly: "But vested rights to the use of such waters shall in nowise be lost, prejudiced or impaired by failure to protest against an application to appropriate the same under this act."[11]

Similar rulings are made in the Federal courts. The effect of the State Engineer's action upon vested rights is open to judicial inquiry there as well as in the State courts.[12] The United States circuit court of appeals in an Idaho case has held all action by the State Engineer in issuing permits to be void where his action injures existing appropriators, and that a permit issued by the State Engineer is of no avail if it is shown in court that the appropriation would injure prior appropriations. An injunction will be granted in spite of the permit.[13] Injunction will be granted against diverting water above a dam to injury of dam and lessening the fall used for power, though defendant had the State Engineer's

[8] Lockwood v. Freeman, 15 Idaho, 395, 98 Pac. 295.

[9] City of Pocatello v. Bass, 15 Idaho, 1, 96 Pac. 120.

[10] Vanderwork v. Hewes (N. M.), 110 Pac. 567.

[11] Stats. 1907, p. 30, sec. 25. In Texas (Sayles' Civ. Stats., art. 312) it is provided that failure to file such statement does not work a forfeiture of rights acquired theretofore, nor prevent the claimants of such rights from establishing them in the courts.

[12] Waha Co. v. Lewiston Co. (Idaho), 158 Fed. 137.

[13] Trade etc. Co. v. Fraser, 148 Fed. 587, 79 C. C. A. 37. See, also, Waha Co. v. Lewiston Co. (Idaho), 158 Fed. 137.

permit.[14] The authority of the State Engineer to issue permits if no one was injured was assumed for the purpose of the case. "If they did so interfere [with any vested right of the appellant], then, manifestly, to the extent of such interference, they were and are invalid and of no effect."[15] Likewise injunction lies against United States Reclamation Service officials infringing existing property rights.[16]

Likewise in the matter of administrative determination of rights, as considered in the next section, such a determination cannot bind anyone whose rights are infringed thereby.

(3d ed.)

§ 1194. Decisions of Water Officials are not Conclusive upon the Courts.—Since the authority of the water officials is administrative and not judicial, and they have no power to impair vested rights, their decision as to what existing rights are is not conclusive. Their action based upon a mistaken interpretation of existing rights will be open to collateral attack in court, by injunction or other process, as will also the action of other parties whom they may have authorized or in whose favor they may have decided. (And this is so held, even though the statute allows an appeal from the administrative decision, since the appeal is held only a continuance of the administrative hearing, and not a judicial proceeding.)[17] If the statute goes further,[18] it is usually said, as in the preceding sections, that it would be to that extent unconstitutional as vesting judicial powers in administrative officers, or as depriving persons of property without a day in court.[19]

Thus, in connection with the making of an appropriation it is held that the decision of the State Engineer does not fix what

[14] Trade etc. Co. v. Fraser, 148 Fed. 587.

[15] *Ibid.*

[16] Minidoka Co. v. Weymouth (Idaho), 113 Pac. 455.

[17] Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210. *Quaere*, whether this holding raises the question whether the statute improperly vests administrative powers upon *judicial* officers upon such appeal. See Title etc. Co. v. Kerrigan, 150 Cal. 289, 119 Am. St. Rep. 199, 88 Pac. 356. In Waha Co. v. Lewiston, 158 Fed. 137, in another connection, such appeal was held to be a judicial and not an administrative proceeding. In Speer v. Stephenson (Idaho), 102 Pac. 365, such appeal was held administrative and not judicial, and hence notice of appeal was held properly served by registered mail or by publication.

[18] The recent Oregon statute says that "injunction shall only be issued in case it can be shown at the hearing that the water-master has failed to carry into effect the order of the board of control or decrees of the court determining the existing rights to the use of water." Or. Stats. 1909, c. 216, sec. 39.

[19] Authorities *supra*, secs. 1192, 1193, note 4.

rights, if any, a party has; that the action of the State Engineer in deciding to cancel or in refusing to cancel a permit may be reviewed in the district court upon appeal or may be questioned in a direct proceeding in the district court, and the court in considering such matter is in no way controlled or concluded by the action of the State Engineer, the court saying: "His decisions do not in any sense or in any way have the concluding effect as to the rights of the parties as would a decree of a court." It only (the court holds) fixes a time from which the statute of limitations begins to run against an action in court, but has no other effect in determining the right, and consequently not only may a party feeling himself aggrieved by the State Engineer's action appeal therefrom in the method usually allowed by these statutes, but the action of the State Engineer is open to judicial inquiry in any other proceeding in court, such as an injunction against a party holding the State Engineer's permit, whether the decision of the State Engineer is directly appealed from or not. The court said: "While the State Engineer is authorized to pass upon and decide in the first instance whether the permit-holder has complied with the law and the terms of the permit, such decision does not deprive any party aggrieved of his right of action in a proper court. The statute does not attempt to make the action of the State Engineer in any way bind or control the courts in determining the same matters."[20] The hearing before the State Engineer is *ex parte* and administrative only.[21] This is further illustrated in the preceding section.

But the chief connection in which the question has arisen is in the determination of existing rights by the Board of Control or Board of Irrigation under the Wyoming system set forth in the next chapter. It was, of course, the intention of the drafters of that legislation to make the board's determination final upon the matter. In the absence of action by the board it is generally held that the statutes do not affect the jurisdiction of the courts to determine whatever disputes arise.[22] But even after the board has

[20] Speer v. Stephenson (1909), 16 Idaho, 707, 102 Pac. 365.

[21] Waha etc. Co. v. Lewiston Co. (Idaho), 158 Fed. 137.

[22] Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210; Farmers' etc. Co. v. Cozard etc. Co., 65 Neb. 3, 90 N. W. 951; Crawford v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889. In Crawford Co. v. Hathaway, *supra*, the court says: "But where the board has made no determination, and a large number of persons are claiming the right to divert and use the water of a stream, some by appropriation under statute, some under prior acts, some by prescription, and others as riparian owners whose rights have accrued prior

acted it is emphatically held in Wyoming, in accord with the rulings upon analogous points already given, that the decision of the board is not of judicial force, is invalid where it erroneously defines the right, and is not conclusive upon the courts in any proceeding when its validity is questioned. In Wyoming an adjudication by the Board of Control or by the water commissioners does not prevent reopening the matter in court in any case.[23] In Willey v. Decker, the court says: "An adverse decision by the Board of Control and the district court on appeal would not defeat the jurisdiction of the court, any more than such a decision would defeat jurisdiction in any other case. Proceedings before the Board of Control are purely statutory, and an appeal to the district court from a decision of the board is merely a continuation of those proceedings in an appellate tribunal. Such an appeal is based upon the statute, and does not invite the general law and equity jurisdiction of the court to afford affirmative relief." Such relief, it was held, may be had in a separate suit in court. And in Ryan v. Tutty the court holds that the officials merely decide for their own guidance in administering the statute, and not as a final determination of rights.[24] Such is the usual holding, as shown by the preceding sections, and by a few additional citations in the note.[25]

to the statute, and have not been devested, we know of no sound reason why a suit in equity to determine and adjust such rights and enjoin interference of those rights by others under a claim of right may not be maintained. Such suits are permitted everywhere where the system of appropriation adopted by our statute obtains. In some States they have been provided by statute, but in the absence of statute, they have been upheld under general principles of equity jurisdiction," though also holding that it is within the discretion of the court to remand the parties to their remedies by application to the board."

[23] Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 87 Am. St. Rep. 918, 61 Pac. 258, 50 L. R. A. 747; Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210; Ryan v. Tutty, 13 Wyo. 122, 78 Pac. 661. Cf. Whalon v. North Platte etc. Co., 11 Wyo. 313, 71 Pac. 995.

[24] Quoting Daley v. Cox, 48 Cal. 127.

[25] A Colorado case holds that the duties of water officials are ministerial, and they cannot settle rights between owners. Boulder etc. Co. v. Hoover (Colo. 1910), 110 Pac. 75. "In Nevada the raising of the question of the constitutionality of an administrative adjudication has been avoided by the State Engineer submitting his findings to a court and having them issued as a decree of the court, instead of issuing them as a decree of the engineer, from which appeal might be taken to the court." Report for 1908, of O. E. S. (U. S. Dept. of Agr.), p. 361. This is the plan adopted by the Oregon statute. In the Hawaiian Islands a statute provided: "It shall be the duty of said commissioners within their several districts to hear and determine all controversies respecting rights of private ways and water-rights between private individuals, or between private individuals and the government." (Code, sec. 997, as amended in Laws 1888, c. 26.) "In settling such controversies, the commissioners

It is true that in Nebraska the courts have tended to hold the decisions of the Board of Irrigation conclusive upon the courts.[1] These decisions were peculiar in that they arose out of the rights of riparian owners, which the court had held to exist in the State, and then later, under pressure from appropriators, held in these cases that those rights could be destroyed by decisions of the Board of Irrigation allowing the waters to be diverted to nonriparian lands by appropriators.[2] But these decisions are not consistent or clear among themselves;[3] they are inconsistent with the weight of

shall give such decision as may in each particular case appear to them to be just and equitable between the parties interested." (Code, sec. 998, amd. in Laws 1878, c. 19.) The decisions of the commissioners were held not conclusive on the courts. Waikulu I. Co. v. Cornwell, 10 Hawaii, 476; Cleghorn's Appeal, 3 Hawaii, 216; Davis v. Afong, 5 Hawaii, 216. It is further held that where parties have certain rights measured by time, water commissioners cannot impose a new apportionment by extent of land; for to do that would be to change the water-rights themselves. Wilfong v. Bailey, 3 Hawaiian Rep. 479.

[1] Crawford Co. v. Hathaway, 60 Neb. 754, 84 N. W. 272; Crawford Co. v. Hathaway, 61 Neb. 317, 85 N. W. 304; Crawford v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889; Farmers' Canal Co. v. Frank, 72 Neb. 136, 100 N. W. 286; McCook Irr. Co. v. Crews, 70 Neb. 115, 102 N. W. 249; Cline v. Stock, 71 Neb. 70, 98 N. W. 454, 102 N. W. 265; Rasmussen v. Blust, 83 Neb. 678, 120 N. W. 184; Rasmussen v. Blust, 85 Neb. 198, 133 Am. St. Rep. 650, 122 N. W. 862. In South Dakota a default was upheld under a statute requiring objections to the decision of commissioners locating an artesian well to be filed within ten days. State ex rel. Township of Dry Run v. Board of Assessment, 1 S. D. 62, 45 N. W. 38.

[2] The same question arises under the Oregon statute as to the rights of riparian owners. They are required to file claims before the Board of Control, i. e., all owners or possessors of lands bordering on and having access to streams (Or. Stats. 1909, c. 216, sec. 13); and while vested rights are, in general terms, declared to be protected by the act, yet there are provisions seeming to authorize the board to limit their rights to waters in actual use.

[3] In Crawford v. Hathaway, a case which went through three hearings, it was each time said that the decision of the board was conclusive upon the courts, and not open to collateral attack. It was held that the courts could enjoin private parties where no hearing had been had before the board, or pending such hearing, but "If a controversy has been submitted to that board, and by it adjudicated, and no appeal taken, an entirely different question is presented," and held that such adjudication ousts the courts of jurisdiction. At the same time, however, the court said that controversies which do not impeach the conclusions of the board may still be tried in court, saying: "It does not, however, necessarily follow from the conclusion just reached as to the powers and duties of the board that the courts are in any way ousted of their jurisdiction over actual controversies. The board is possessed of powers of an administrative character. The courts have judicial powers, and, while the board may make all needful preliminary determinations to enable it to regulate the distribution of water, and may determine whether or not proposed appropriations shall be allowed, and in what order, in pursuance of the provision of the statute, subject to the right of appeal, whenever a controversy arises over the substance of the rights of various parties making use of a stream, such controversies are proper for the courts to take judicial cognizance of. The courts cannot administer the statute

authority already given; and are unsound upon principle, as is the conclusion reached in considering these cases independently in another connection,[4] and as is shown by the general adoption, in most States, of a system of adjudicating rights by special proceedings in court and not by administrative officers.[5]

(3d ed.)

§ 1195. **Duties of Water Officials.**—Concerning the duties of water officials in Colorado, it is said:[6] "By section 2448, 1 Mills' Annotated Statutes, it is made the duty of the superintendent of irrigation to distribute the waters in his division in accordance with the rights of priority of appropriation as established by the judicial decrees entered in the several water districts included in such division, and that he shall have general control over the water commissioners of the districts embraced in his division. The several decrees of the water districts within a water division are to be treated as one, and the water distributed accordingly. It is the duty of the superintendent of a water division to make such distribution by direction to the water commissioners under his control." And elsewhere in the same case: "The laws of the State providing for officials to distribute the waters of our streams for agricultural uses according to adjudicated priorities were passed for the purpose of securing an orderly distribution of such waters, and to prevent breaches of the peace which would inevitably ensue if the owners of priorities were permitted to divert and divide the waters of our streams according to their ideas of their adjudicated rights and needs. These laws must be strictly enforced and observed, and the courts have no power to annul them."

A water commissioner in Colorado has authority over the various ditches or companies directly taking from a stream, but not over consumers from the same ditch, which is a company affair. "A water commissioner is not required, nor is it his duty, to make any division or distribution of the water between the users thereof from the same ditch, neither has he the authority to interfere with the internal management of the affairs of a ditch company; but it is his

nor regulate the use of the streams, but they can and should adjudicate disputes based on the rights of parties acquired under the statute." Crawford v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889. See, also, Farmers' etc. Co. v. Cozard etc. Co., 65 Neb. 3, 90 N. W. 951, holding that action before the under-assistant is not necessary before suit in court over disputes not in terms confided to such assistants.

[4] *Supra*, secs. 616, 651 et seq.

[5] *Infra*, c. 31.

[6] McLean v. Farmers' etc. Co., 44 Colo. 184, 98 Pac. 16.

duty to turn no more water into a ditch to which it may be entitled by virtue of any decree than is necessary to serve the needs of the consumers under such ditch, and to refuse to turn water into any ditch for the use of one not entitled thereto."[7]

The water-master cannot be required to go beyond the provisions of the decree to ascertain whether or not the same is supported by the findings or whether there is a conflict between the findings and decree, but he can look only to the decree for his instructions as to the amount of water to be distributed to each claimant.[8]

(3d ed.)

§ 1196. Actions by and Against Officials.—A water commissioner is a public official,[9] and may be enjoined like other officials if acting in excess of his authority, and adverse rulings of his may be questioned in court so far as they exceed his authority.[10] In an action to enjoin a water commissioner from diverting water from a stream, the persons for whose benefit it is diverted are necessary parties.[11] Officials having power to shut off water cannot be held for damages for failure to do so in the absence of notice of wrongdoing.[12]

Where illegality of official action is relied upon as a ground for invoking the aid of a court to restrain steps to be taken in consummation thereof, it is held in Colorado that the party seeking such relief must allege the facts which constitute the illegality complained of.[13]

Mandamus lies against the State Engineer to enforce performance of his duties so far as they do not involve questions of his judgment and discretion, but only ministerial acts.[14] In

7 Cache La Poudre Co. v. Hawley (1908), 43 Colo. 32, 95 Pac. 317. Cf. Boulder etc. Co. v. Hoover (Colo.), 110 Pac. 75.

8 Stethem v. Skinner (1905), 11 Idaho, 374, 82 Pac. 451.

9 Roberson v. People ex rel. Soule, 40 Colo. 119, 90 Pac. 79.

10 Preceding sections.

11 Squires v. Livezey, 36 Colo. 302, 85 Pac. 181. Compare McLean v. Farmers' Co., 44 Colo. 184, 98 Pac. 16; Boulder etc. Co. v. Hoover (Colo.), 110 Pac. 75.

12 Farmers' etc. Co. v. Maxwell, 4 Colo. App. 447, 36 Pac. 556.

13 McLean v. Farmers' etc. Co., 44 Colo. 184, 98 Pac. 16, holding no cause of action stated.

14 Idaho etc. Co. v. Stephenson (1909), 16 Idaho, 418, 101 Pac. 821, saying: "The issuance of the certificate is a ministerial duty, and, in case the State Engineer refuses to issue it after the proper fee has been tendered, he may be compelled by writ of mandate to issue it. Of course, if there was any question in regard to the sufficiency of the proof of completion, the State Engineer could not be required to decide that such proof was sufficient, as his discretion in deciding that matter cannot be controlled by mandate." Compare Cache La Poudre Co. v. Hawley, 43 Colo. 317, 95 Pac. 317.

mandamus against him, the water commissioner cannot raise the question of abandonment of a decreed right, nor questions involved in change of point of diversion, since only injured parties can raise such points.[15]

(3d ed.)

§ 1197. Pay of Water Officials.—The State Engineer's salary is fixed by the statute; being, for example, $3,600 in Nevada, $2,400 in Idaho, and $2,000 in South Dakota and Nebraska.

A water commissioner has no jurisdiction outside his district, and cannot claim compensation for work performed beyond its boundaries, though the headgates of such outside ditches are within his district.[16] Nor can a county with no irrigated land within a certain water division be forced to contribute to the salary of the superintendent of that division.[17] To hold lands for the salary of irrigation officials, the land must not only be within the water district, but must be irrigated by its waters.[18] In Idaho, a water-master has no authority to begin work as water-master until he has been called upon by two or more owners or managers of ditches or persons controlling ditches in his district, by application in writing stating that there is a necessity for the use of water, and is entitled to no pay for work done without request, and only from those who request it, where some request and some do not.[19] In Wyoming, the statute is very similar to that in Idaho upon which this decision was based.[20] So, a late Utah statute says that water commissioners (unless called upon by the State Engineer) shall not begin work until called in by one or more appropriators in writing.[21]

(3d ed.)

§ 1198. Water Commissioners and State Engineer in California and Other States That have not Adopted Water Codes.—The office of the State Engineer was created in 1878,[22] and William Ham Hall became State Engineer. He started his work on an elaborate

[15] Boulder etc. Co. v. Hoover (Colo. 1910), 110 Pac. 75.

[16] Fravert v. Board etc., 39 Colo. 71, 88 Pac. 873.

[17] Chapman v. Bd. of Co. Com. of Phillips Co., 17 Colo. App. 236, 68 Pac. 134.

[18] Chew v. Board of Commrs. etc., 18 Colo. App. 162, 70 Pac. 764. See, also, concerning action of irrigation official for salary, Board etc. v. Wheeler, 39 Colo. 207, 88 Pac. 50; County Commissioners v. Locke, 2 Colo. App. 508, 31 Pac. 351.

[19] Walker v. Elmore County (1909), 16 Idaho, 696, 102 Pac. 389.

[20] Wyo. Rev. Stats. 1899, sec. 894, amd. 1907, c. 86.

[21] Stats. 1911, c. 104, p. 145, sec. 8.

[22] Stats. 1877–78, p. 634.

plan, intending an irrigation survey similar to the then recent famous Geological Survey of California by Professor J. D. Whitney. His work, published in two volumes, disappointed the legislature, especially when it was seen that the first volume (published in 1888) consisted mostly of translation of foreign laws. Mr. Hall said in his second volume (preface) that the legislature complained that he was accomplishing nothing and threatened to cut off his appropriation. The appropriation was in fact withdrawn in 1889 [23] and the office afterward was abolished.

Water commissioners were provided in California at an early date.[24] The act applied to only a few counties and was frequently amended,[25] and at the time of Lux v. Haggin [1] it was doubted whether these acts remained in force at all. They are of no practical operation to-day.[2] Under these statutes it has been held that water commissioners cannot abridge the rights of riparian owners,[3] nor can the consent or authorization of water commissioners give any rights against any prior claimants.[4]

The office of State Engineer was again created in 1907,[5] but beyond providing for co-operation with the United States Reclamation Service, has no connection with irrigation or the use of waters. A statute was also passed in 1909 for a hydrographic survey of the State.[6] In 1911, California Statutes provided for a State Engineer and Board of Irrigation (confined, as to waters, to an investigation of resources), a Conservation Commission, and a State Board of Water Power Control.[6a]

In Montana there is a State Engineer who is president of the Carey Act Land Board, but otherwise is not connected with waters; except that he shall make a stream survey of the State,[7] and there is a statute for appointment of court commissioners to execute decrees.[8]

In Washington the statutes provide for water districts, each county being a district, with a water commissioner for each. These

23 Stats. 1889, c. 328.
24 Stats. 1854, p. 76.
25 Last amended 1862, p. 234.

1 69 Cal. 255, 10 Pac. 674.

2 Cf. Political Code, sec. 19, continuing in force acts concerning water commissioners. Compare Strong v. Baldwin (1908), 154 Cal. 150, 129 Am. St. Rep. 149, 97 Pac. 178.

3 Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Charnock v. Rose, 70 Cal. 189, 11 Pac. 625.

4 Lakeside Ditch Co. v. Crane, 80 Cal. 181, 22 Pac. 76. For some other decisions under these statutes, see Pico v. Colimas, 32 Cal. 578; Daley v. Cox, 48 Cal. 127.

5 Laws 1907, c. 183.

6 Cal. Stats. 1909, c. 704.

6a *Supra*, secs. 125, 422; and *infra*, sec. 1432.

7 Mont. Laws 1911, c. 128, p. 352.

8 Stats. 1911, c. 43, p. 72.

water commissioners are to keep a register of appropriations, and apportion the water, control headgates, etc.[9]

In all States, courts have power, with or without statutes, to appoint commissioners to carry out decrees, if necessary.[10]

(3d ed.)

§ 1199. **Comments of the United States Department of Agriculture.**—As this legislation is comparatively recent and not extensively as yet reviewed by the courts, some quotations concerning its operation are appended from Bulletin 168 of the United States Department of Agriculture, entitled, "The State Engineer and His Relation to Irrigation."

Colorado.—"These records have never been kept up by the commissioners, the reasons usually assigned being that the county commissioners, who must allow the bills of the water commissioners, have refused to pay for the time necessary for the collection of the data required. The commissioners have been repeatedly urged to collect the information while about their other duties, but have not generally done so. They complain also that farmers and ditch-owners will not give them the information, seeming to think that it may in some way be used to their disadvantage."

"With the exception of the filing and approval of plans and the examination of dams complained of, the law regarding reservoirs is not generally enforced because of lack of funds. There are hundreds of reservoirs in Colorado, and an annual inspection to determine how much can be safely stored would require a large outlay."

"Anyone dissatisfied with any action of the commissioner may appeal to the division engineer and through him to the State Engineer, but the usual practice has been to disregard the orders of the commissioner and then apply to the court for an injunction restraining him from enforcing them."

"The commissioners and their deputies are given the power to makes arrests. Very little is done under this, however. The commissioners find that in many cases the district attorneys will not prosecute, or if they do they make little effort to convict. Juries will seldom convict for this offense. The early reports of the com-

9 Pierce's Codes, secs. 5826, 5840–5847. See, also, Stats. 1909, c. 209, p. 221.

10 *Supra*, sec. 640. See Montezuma etc. Co. v. Smithville Co. (Ariz.), 31 Sup. Ct. Rep. 67, citing the second edition of this book.

missioners, published in the reports of the State Engineer, are largely made up of statements of their troubles with parties who refused to obey their orders and threatened bodily harm to them in case they attempted to perform their duties. However, the sentiment against the unlawful taking of water and in favor of the punishment of those who do so seems to be growing."

Idaho.—"To aid in a proper distribution of the water, all appropriators are required to maintain headgates and measuring flumes in their ditches. . . . . Little has been done under this law thus far for the same reason that arrests are not made for changing headgates. It is not considered desirable to make the law obnoxious to the water users, but rather to create a sentiment in favor of its enforcement, which is gradually being accomplished."

Nevada.—"For instance, he [the State Engineer] decides that the rights antedating 1875 can be supplied at a particular time. Among the holders of rights prior to that date priorities are not recognized, but the water is distributed to them in the manner in which, in the opinion of the engineer, it can be made to do the most good.

"It is probable that any holder of an early right might have succeeded in securing his full supply regardless of the sufferings of his neighbors had he gone into court; but with one exception no objection was made to the distribution made by the engineer. The party objecting attacked a water commissioner and was fined for resisting an officer."

Utah.—"Failure to put in structures within thirty days after requested to do so by the engineer is a misdemeanor, but no punishment is specified. The engineer has not pushed this matter."

Speaking Generally.—"Most of the States have provided for this by requiring ditch-owners to put in headgates and measuring devices on the request of the water officials. Various means of enforcing this provision, in case the owners refuse to put in the structures, have been tried, such as having the official put them in and collect the cost through the county commissioners or by suit in the court, or having the county commissioners put in the structures and tax the cost against the property of the ditch-owner. All such systems have proved ineffective, partly because county commissioners are apt to be in sympathy with the ditch-owners, and refuse to act, and partly because of the delay which is unavoidable where so many

different agencies are required to act. The only provision which has been uniformly effective is giving the water officials power to refuse to deliver water to parties who do not comply with their orders within a reasonable time."

§§ *1200–1205. (Blank numbers.)*

CHAPTER 50.

DETERMINATION OF EXISTING PRIORITIES BY ADMINISTRATIVE OFFICERS.

§ 1206. Wyoming method.
§ 1207. Preparatory steps.
§ 1208. Procedure.
§ 1209. Certificates.
§ 1210. Constitutionality of these statutes.
§ 1211. How far excluding proceedings in court.
§§ 1212–1221. (Blank numbers.)

(3d ed.)

§ 1206. Wyoming Method.—A census determination and listing is made of all existing appropriations in the States adopting water codes. The duty of doing this rests, in three States following Wyoming (Nebraska, Nevada and Wyoming), with the head of the administrative organization. In the 1909 Oregon statutes, the determination is primarily by the administrative officers, who submit their conclusions to the courts for final decision.[1] In Farm Inv. Co. v. Carpenter[2] it is said: "The special proceeding for adjudication was purely statutory, and the only reason for its creation is to be found in the inability of the ordinary procedure and processes of the law to meet the necessities pertaining to the segregation by various individuals or companies of water from the same stream, by separate ditches or canals, and at different points along its course, under rights by appropriation to so divert and use the water. A similar proceeding in Colorado has been held to be based upon or to grow out of the police power of the State."[3]

The States referred to in the next sections are given only as examples. References to the statutes of all will be found at the end of this book in the part devoted to statutes. The provisions of the statutes go very particularly into details of procedure.

[1] Determination of existing priorities were also rested with the Board of Control in the 1905 statute of New Mexico (Stats. 1905, p. 270, sec. 29), but changed in 1907 to the method in the next chapter.

[2] 9 Wyo. 110, 87 Am. St. Rep. 918, 61 Pac. 253, 50 L. R. A. 747.

[3] Citing Farmers' Independent Ditch Co. v. Agricultural Ditch Co., 22 Colo. 513, 55 Am. St. Rep. 149, 45 Pac. 444; White v. Farmers' High Line Canal etc. Co., 22 Colo. 191, 43 Pac. 1028, 31 L. R. A. 828. See, also, Louden etc. Canal Co. v. Handy Ditch Co., 22 Colo. 102, 110, 43 Pac. 535.

(3d ed.)

§ 1207. **Preparatory Steps.**—In Nevada, the State Engineer sends out blanks to be filled up by all existing claimants, and sworn to, and he collects all existing decrees of courts and other data available, and prepares complete maps.[4] A failure of claimant to file his claim is a crime.[5] In Wyoming, a notice of investigation is published for each stream, and all claimants then fill out sworn statements on blank forms, and the division superintendent then takes all evidence available, surveying the stream and examining claimants.[6] The Oregon statute follows that of Wyoming.[7] Adjudication begins on petition of some water user, the officials make a survey and take testimony, and file a report in each county, and the board makes its order.

(3d ed.)

§ 1208. **Procedure.**—In Nebraska, the whole procedure is left to the determination of the State board, subject to appeal to the courts.[8] In Nevada, from the data collected as above, the State Engineer prepares a list of priorities and issues certificates, subject to action against him in the courts.[9] In Wyoming, the evidence gathered as above by the division engineer is placed before the State Engineer, who prepares maps therefrom. The maps and other data are then all placed before the Board of Control, which adjudges the right of each claimant, subject to a rehearing or an appeal to the courts within one year.[10] In Oregon, the conclusions of the Board of Control must be approved by the district court before they are final.[11]

(3d ed.)

§ 1209. **Certificates.**—In Nebraska, the priorities thus determined are recorded in the office of the State board, and a certificate issued to the appropriator.[12] In Nevada, the list prepared by the State Engineer as above is recorded with the county recorder, and that list is relied on thereafter.[13] Certificates are also issued to the appropriators.[14] In Wyoming, the Board of Control

4 Nev. Stats. 1903, p. 18; Stats. 1907, p. 30, secs. 18, 19.

5 Nev. Stats. 1907, p. 30, sec. 16.

6 Wyo. Rev. Stats., 861 et seq. Failure to appear at proceedings forfeits rights. Wyo. Stats. 1901, c. 67, sec. 2.

7 Stats. 1909, c. 216, sec. 35.

8 Comp. Stats. 1903, sec. 6427.

9 Stats. 1903, p. 18.

10 Rev. Stats. 872, 874, 883; Stats. 1901, p. 70.

11 Or. Stats. 1909, c. 216, sec. 24.

12 Neb. Comp. Stats. 1903, secs. 6427, 6429.

13 Stats. 1903, p. 18; Stats. 1907, p. 30, secs. 17, 18 et seq.

14 *Ibid.*

issues a certificate of priority, which is recorded with the county clerk.[15]

In Nebraska all claims are considered established which date prior to 1895, and the filing of a claim dating prior to that year would now be regarded with much doubt by the State Engineer.

(3d ed.)

§ 1210. **Constitutionality of These Statutes.**—Where the determination is by the State Board or State Engineer, it has been made a question whether the statutes are unconstitutional as conferring judicial powers on administrative officers. The general holding, however, has been that in this as in other matters the power of the water officials is administrative or ministerial, and the statutes are hence constitutional. Reference is made to the preceding chapter, where the point is considered in this as well as various other aspects in which it has arisen.[16]

(3d ed.)

§ 1211. **How Far Excluding Proceedings in Court.**—The statutes usually in whole, or in large part, declare that the determination of the administrative officers shall be conclusive unless directly appealed from, and cannot be collaterally attacked; that is, they may only be disputed by direct application to the board itself or a direct appeal from the board's decision when rendered, but not otherwise. For example, it is enacted in Wyoming,[17] "The final orders or decrees of the State Board of Control, in the proceedings provided by law for the adjudication and determination of rights to the use of the public waters of the State, shall be conclusive as to all prior appropriations, and the rights of all existing claimants upon the stream or other body of water lawfully embraced in the adjudication, subject, however, to the provisions of law for rehearings in such proceedings and for the reopening of the orders or decrees therein and for appeals from such orders or decrees." In Oregon, where the board must have its determination approved by decree of court before it is final, the statute makes it obligatory upon the court to give its approval if no exceptions to the report are filed, and in case such be filed, the court has (*semble*) no power to reject the report, but may only send it back for modification.[18] During the hearing in court upon the board's report,

15 Rev. Stats. 873.
16 *Supra*, sec. 1192 et seq.
17 Stats. 1901, c. 67, sec. 1.
18 Or. Stats. 1909, c. 216, secs. 25, 26.

"the division of water from the stream involved in such appeal shall be made in accordance with the order of the board," [19] and further, "The determinations of the Board of Control as confirmed or modified as provided by this act in proceedings shall be conclusive as to all prior rights, and the rights of all existing claimants upon the stream or other body of water lawfully embraced in the determination." [20]

But, as considered in the foregoing chapter, it is usually held that, while the decisions of the water officials are entitled to great respect, and in practice are not often disputed, yet the statute cannot vest in them the finality of judicial powers, nor take from the courts the power to grant relief to a party whose rights the officials may have infringed (whether he has directly appealed or not, it is held); although the board's decision may, however, have the effect of starting the statute of limitations.[21]

[19] *Ibid.*, sec. 28.
[20] Or. Stats. 1909, c. 216, sec. 33.
[21] *Supra*, c. 49.

§§ *1212–1221. (Blank numbers.)*

CHAPTER 51.

DETERMINATION OF PRIORITIES BY SPECIAL PROCEEDINGS IN COURT.

§ 1222. Colorado method.
§ 1223. Preparatory steps.
§ 1224. Procedure on suit.
§ 1225. Decree and certificate.
§ 1226. Constitutionality of these statutes.
§ 1227. Same—Due process of law.
§ 1228. Nature of the proceedings.
§ 1229. Carrier or consumer.
§ 1230. Scope of proceedings.
§ 1231. Form of decree, costs, etc.
§ 1232. Effect of decree—Time limitations.
§ 1233. Same—*Res adjudicata.*
§ 1234. Conclusion.
§ 1235. Comment of Department of Agriculture.
§§ 1236–1244. (Blank numbers.)

(3d ed.)

§ 1222. **Colorado Method.**—In most of the States having special water codes, special statutory proceedings in court are provided, following a method which originated in Colorado, whereby all claimants on a stream are brought into a court in a single suit and a decree rendered seeking to fix permanently the rights of each. This method is now in force in Colorado, Idaho, North Dakota, Oklahoma, New Mexico, South Dakota, Utah and to some extent also in Oregon,[1] Washington and Montana.[2]

The States referred to in the following are given merely as examples. Reference to the statutes of each State will be found in a later part of this book. It should be noted that courts have power, without special statute, to settle rights under the ordinary procedure, and to appoint commissioners to execute their decrees.[3]

(3d ed.)

§ 1223. **Preparatory Steps.**—In Utah the State Engineer must make a complete survey of each river system or watercourse of

1 As to Oregon, see the preceding chapter. The Oregon statute aims at a combination of the Colorado and Wyoming methods, adopting more of the latter than the former.

2 See Part VIII, statutes of the various States.

3 *Supra*, secs. 629, 640.

the State, beginning with those most used for irrigation, collecting all data available. He must publish a notice in a newspaper for fifteen days before commencing on any system. He files the results with the clerk of the district court, which shall then have exclusive jurisdiction to determine priorities of right on that stream, and the clerk of the court then publishes notice in a newspaper requiring all claims to be filed within six months. A sworn statement is filled out by each claimant, and all are tabulated by the State Engineer. In Colorado, the proceedings are not on the initiative of the State, but are begun by some claimant on the stream filing suit to have his right determined.[4] In Idaho, provisions based on the Colorado statutes were enacted in the Code of Civil Procedure;[5] but the new statute provides for the initiative of the State on streams not yet adjudicated. For all such streams the water commissioner must bring suit in the district court against all claimants, and, after filing the suit, make an examination and survey of the stream and gather all available information and present it to the court.[6] In some of the other States the suit is brought in the name of the attorney general.[7]

(3d ed.)

§ **1224. Procedure on Suit.**—In Colorado, the proceedings are upon the initiative of some claimant.[8] He makes an application to the court and notice is published.[9] The form of hearing is specially provided for,[10] and the judge may order it before a referee, in which case the form of hearing is likewise specially provided for.[11] A specific decree is then rendered. An appeal may be taken to the supreme court.[12] In Utah, the court may then appoint a referee or may determine priorities without a referee.[13] The state-

4 M. A. S. 2403 et seq.; Rev. Stats. 1908, sec. 3276 et seq.

5 (1901), sec. 3791.

6 Stats. 1903, p. 223, secs. 34 et seq., 37, as amended 1905, p. 357.

7 Idaho, New Mexico, North Dakota, Oklahoma, South Dakota. See statutes, *infra*, Part VIII.

8 The statement of claim required may be made by any one of the owners. Mills' Ann. Stats., sec. 2403; Putnam v. Curtis, 7 Colo. App. 441, 43 Pac. 1056; Park v. Park (1909), 45 Colo. 347, 101 Pac. 406.

9 M. A. S. 2405 et seq.

10 M. A. S. 2403.

11 M. A. S. 2409 et seq.; Rev. Stats. 1908, secs. 3291–3306. "It is made the duty of the referee to take the testimony in writing and to file it with the clerk of the district court, and it is made the duty of the clerk to preserve the files intact, and, unless there is something in the record by which it affirmatively appears that some of the files or some of the depositions were missing, we will presume that these officers did their duty, and that the files contained the entire record." Woods v. Sargent, 43 Colo. 268, 95 Pac. 932.

12 M. A. S. 24 et seq.

13 Stats. 1911, c. 3, p. 2; Comp. Laws 1907, sec. 1285.

ments filed by claimants stand in place of pleadings. Testimony may be taken at such places as advisable, giving notice to claimants as each claim comes up. Any interested party may file a contest.

An Idaho act of 1911 provides a summary procedure to establish any right omitted from, or arising subsequent to, an adjudication decree. Suit is to be filed against the water-master, accepting the correctness of findings in the former proceedings, and publishing notice. The decision is to be *prima facie* evidence only, and open to collateral attack.[13a]

(3d ed.)

§ 1225. **Decree and Certificate.**—In Colorado, the clerk of the court issues a certificate of the decree, and the holder files this with the water commissioners of his district, and this is relied on by them.[14] It is recorded.[15] The State Engineer and the division engineer each keep a list of the decreed priorities.[16] In Utah, the decree is rendered by the court upon the findings of the referee, if satisfactory to the court, subject to appeal to the supreme court. A certificate is then issued in duplicate to each owner containing the facts stated in the decree. One copy is to be recorded within thirty days with the county recorder [17] and the other with the State Engineer. Similar steps are taken in the other States following this method.

In Colorado, a similar proceeding is specially provided for other uses than irrigation,[18] though usually these provisions are originally made to cover all uses of water. In Colorado a similar procedure is likewise specially provided for changes in the place of diversion.[19] This special procedure is expressly made exclusive in all these matters.[20] In all the States the result aimed at is the issuance and recording of consecutively numbered certificates of priority.

(3d ed.)

§ 1226. **Constitutionality of These Statutes.**—As a general principle, these acts are constitutional.[21] Where the duty of bring-

[13a] Idaho Stats. 1911, c. 224, p. 709. See *supra*, sec. 625 et seq.

[14] M. A. S. 2404, 2408.

[15] M. A. S. 2404.

[16] 3 M. A. S., 1905 ed., 2447i.

[17] In South Dakota, with the water commissioner.

[18] 3 M. A. S., 1905 ed., 2399a et seq. Originally the Colorado statutes applied only to irrigation. Platte etc. Co. v. Northern etc. Co., 12 Colo. 525, 21 Pac. 711.

[19] 3 M. A. S., 1905 ed., 2273d et seq. See *supra*, sec. 506.

[20] 3 M. A. S., 1905 ed., 2339.

[21] McLean v. Farmers' etc. Co., 44 Colo. 184, 98 Pac. 16, saying: "Counsel for plaintiffs contend that the act for the distribution of waters passed by the General Assembly of 1887 (Sess.

ing suit is placed on some public official, as, for example, the attorney general or water commissioner, it has been on the theory that the State owns the water, as already discussed,[22] and is suing concerning its own property. The courts do not logically follow out this theory. As already shown, they construe such a declaration of State ownership as meaning no more than that waters are "*publici juris,*" and the power of the State must still be found, if at all, in the police power. In Idaho, the parts of the statute[23] providing for determination of priorities by suit by water commissioner are held unconstitutional, but leaving the remaining parts of the act unaffected thereby. They are held unconstitutional because (1) they do not provide for personal service on known resident claimants, but publish summons against "all claimants to the right to the use of the water"; (2) it is special legislation as providing a different service of summons than that used in private suits; (3) the water commissioner, a public official, is not the real party in interest, the question being one of determination of purely private rights, and the county cannot be required to pay the costs; (4) it is not a valid exercise of police power.[24] The court, however, has held the proceedings not otherwise obnoxious as special legislation applying only to waters or as imposing costs on an innocent party,[25] and held that it applied to suits in progress at the time of the passage of the act as to matters not held unconstitutional in Bear Lake v. Budge.[1]

(3d ed.)

§ **1227. Same—Due Process of Law.**—The Idaho court also considered the question of due process of law in the procedure pro-

Laws 1887, p. 295) is unconstitutional. That question was long since settled to the contrary in Farmers' Independent Ditch Co. v. Agricultural Ditch Co., 22 Colo. 513, 55 Am. St. Rep. 149, 45 Pac. 444." Accord, Broad Run Co. v. Devel. Co., 47 Colo. 573, 108 Pac. 755.

[22] *Supra,* secs. 6, 170.

[23] Sections 34, 35 and 36 of the Idaho Act of 1903, p. 223.

[24] Bear Lake County v. Budge, 9 Idaho, 703, 108 Am. St. Rep. 179, 75 Pac. 614.

[25] Boise etc. Co. v. Stewart, 10 Idaho, 38, 77 Pac. 31.

[1] The following comment is contained in the report of 1909 of the United States Department of Agriculture: "This provision is based on the theory that the water belongs to the State or to the public, and that the State, either as owner or as trustee for the public, is an interested party, empowering it to bring such suit. This view has been overruled by the Idaho supreme court, and the State cannot force an adjudication. The Idaho law now provides that when suits involving water-rights are instituted the court may call upon the State Engineer for surveys, etc. The laws of North Dakota, South Dakota, Oklahoma, and New Mexico contain the provision which was overruled in Idaho, but in these States it has not been passed upon by the courts."

vided. Actions of this character to settle or establish rights are proceedings *in rem* or *quasi in rem*,[2] in which the court, by statute, has jurisdiction over the property involved irrespective of jurisdiction over the person of the owner. But the fact of jurisdiction does not dispense with the constitutional requirements of due process of law in exercising it. Process must be served on the owner. If the owner is unknown or cannot be found or is out of the State, the statute is not invalid because as to him service by publication alone is provided. As to him, service by publication is sufficient because, as was said in a California case under a similar statute for establishing land titles, the constitutional guaranty of due process only requires "that in actions of this character persons whose interest in the land may be affected must be given such notice of the pendency of the proceedings and of the fact that their interests may be affected as is reasonable and appropriate to the nature of the case."[3] But if an owner is known and a resident of the State and can be found therein, process must be personally served upon him, and in Bear Lake Co. v. Budge, *supra*, the statute was held unconstitutional for not providing such service and leaving it merely with the newspaper publication.[4] The Idaho court said: "The State as well as the Federal constitution prohibits the deprivation of private property without due process of law. They contemplate reasonable service of summons upon all defendants. And reasonable service of summons is actual service upon all known defendants who reside in and can be found in the county when the suit is brought; and we think it requires personal service upon all known defendants residing within the State if such defendants can be found therein. The act in question does not require the defendants to be named in the complaint, and, in the case pending before the defendant judge, the defendants in that suit are designated as follows: 'All claimants to the right to the use of water of Dairy Canyon Creek whose rights have not yet been adjudicated.' The summons in said ac-

2 Combs v. Farmers' etc. Co., 38 Colo. 420, 88 Pac. 399; Roberson v. People ex rel. Soule, 40 Colo. 119, 90 Pac. 79.

3 Title etc. Co. v. Kerrigan, 150 Cal. 289, 119 Am. St. Rep. 199, 88 Pac. 361, regarding the establishment of titles in San Francisco after the destruction of public records in the fire of April, 1906.

4 The California statute was carefully drawn to provide personal service upon known resident claimants, in order to meet this objection, and has just been upheld in the supreme court of the United States. American Land Co. v. Zeiss (U. S. 1911), 31 Sup. Ct. Rep. 200. *Quaere*, whether registered mail can, by statute, be used as *personal* service in a *judicial proceeding*. It would seem proper. See Tyler v. Judges, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433.

tion designates the defendants in the same manner, and does not contain the name of any defendant, and provides for constructive service thereof without any showing whatever for its necessity. No doubt personal service might be had upon many of the defendants, if not all of them, in the county where such suit is pending or through which the decreed stream runs. We know of no precedent for service of summons as provided in this act, where the title to property is directly involved between private individuals."[5] The decision is important because in this undoubtedly correct, and other water codes have adopted the same defect.[6]

This, however, applies only to proceedings before judicial tribunals, whose judgments and decrees bind a party's rights, and not to proceedings before administrative officers, such as the State Engineer, whose decisions are made for administrative guidance but do not bind the right in the same conclusive sense as a decree of court.[7]

(3d ed.)

§ 1228. **Nature of the Proceedings.**—The proceedings are purely statutory, and are *in rem* or *quasi in rem*. In one case,[8] it is said that the statutory proceeding to adjudicate the right to the use of water is not an ordinary action or proceeding, but it is *sui generis;* and in other decisions of this court it is spoken of as in the nature of a proceeding *in rem*.[9] The statutes are in the na-

[5] Bear Lake County v. Budge, 9 Idaho, 703, 108 Am. St. Rep. 179, 75 Pac. 614.

[6] Compare the Torrens System of registering land titles.

[7] Speer v. Stephenson (1909), 16 Idaho, 707, 102 Pac. 365, saying (referring to the Budge case): "In that case the proceeding was in a court where the judgment of the court finally determined the rights of the parties; in this case the proceeding is not in a court, but before a ministerial officer whose decision or determination of the questions of fact presented to him does not conclude or bind the parties." It was also said in the same case: "This being a special proceeding conducted by the office in the administration of the law, we are not advised of any constitutional objection against the legislature prescribing that service by registered mail addressed to the last known postoffice address is not sufficient to support such proceedings. . . . . Where the proceeding is special, administrative in character, and the conclusion of the officer rendering a decision therein does not conclude the rights of the parties, and they are left to their right of action in the courts without in any way being influenced or controlled by the decision of the State Engineer, we believe that such notice is reasonable notice and fulfills the requirements of the constitution as to due process of law." Accord, as to registered mail in administrative proceedings, see Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 87 Am. St. Rep. 918, 61 Pac. 258, 50 L. R. A. 744.

[8] Sterling Irr. Co. v. Downer, 19 Colo. 595, 36 Pac. 787. See, also, Title etc. Co. v. Kerrigan, 150 Cal. 289, 119 Am. St. Rep. 199, 88 Pac. 356.

[9] Louden Canal Co. v. Handy Ditch Co., 22 Colo. 102, 113, 43 Pac. 535; Broad Run Co. v. Devel. Co., 47 Colo. 573, 108 Pac. 755.

ture of police regulations, to secure the orderly distribution of water for irrigation purposes; and to this end they provide a system of procedure for determining the priorities.[10] Being *in rem* and not in *personam*, it is held that opposition to the water commissioner who seeks to enforce the decree is not a contempt of court.[11]

An action to quiet title is strictly *in personam*, but by statute is frequently given an additional effect *in rem*, and these proceedings bear some analogy thereto. "It is manifest from a careful examination of our statutes and from the repeated decisions of our courts that our proceeding, if not technically one to quiet title, is quite analogous thereto."[12] But a technical action to quiet title will not lie where the special proceeding is provided.[13] Such proceedings are distinct from injunction suits,[14] and statutes allowing the joinder of all users do not apply to suits for damages without equitable relief, where the parties did not act jointly.[15] A statute such as last mentioned[16] will be followed by the Federal courts.[17] The decree may be enforced by *mandamus* against the water commissioner,[18] and in such a *mandamus* suit title to the decreed water-right cannot be tried.[19]

The Colorado decree gives no new right, but only establishes an old one and perpetuates evidence thereof.[20]

(3d ed.)

§ 1229. **Carrier or Consumer.**—As elsewhere discussed,[21] Colorado and the arid States generally hold the consumer from the ditch of a distributing company to be an appropriator from the natural stream through the intermediate agency of the ditch. Nevertheless, the Colorado court has consistently restricted the adjudication proceedings to the company as appropriator. There is thus no special statutory procedure in Colorado to settle the rights of consumer-appropriators *inter se*. Only the rights between dis-

10 *Ibid.*, and Combs v. Farmers' etc. Co., 38 Colo. 420, 88 Pac. 396.

11 Roberson v. People ex rel. Soule, 40 Colo. 119, 90 Pac. 79.

12 Crippen v. X. Y. Z. Ditch Co., 32 Colo. 447, 76 Pac. 797.

13 Fluke v. Ford, 35 Colo. 112, 84 Pac. 469.

14 Medano etc. Co. v. Adams, 29 Colo. 317, 68 Pac. 431; Buckers etc. Co. v. Farmers' etc. Co., 31 Colo. 62, 72 Pac. 49.

15 Miles v. Du Bey, 15 Mont. 340, 39 Pac. 313.

16 Mont. Civ. Code, sec. 1891.

17 Ames Realty Co. v. Big Indian Co. (Mont.), 146 Fed. 166.

18 Boulder etc. Co. v. Hoover (Colo.), 110 Pac. 75.

19 Northern Colo. Co. v. Pouppirt, 47 Colo. 490, 108 Pac. 23.

20 Alamosa etc. Co. v. Nelson, 42 Colo. 140, 93 Pac. 1114.

21 *Infra*, sec. 1338.

tributor-appropriators (the carriers) are decreed in these proceedings.

The statutory proceedings for adjudication of priorities do not apply to consumers from the same ditch *inter se*, but only to appropriators in separate ditches, and the rights of the former cannot be determined in such a proceeding.[22] Consumers holding rental rights are not necessary parties, but only the companies supplying them from the stream.[23]

It is said in one case[24] "that the question of the title of the sundry owners and users of the water covered by the priorities awarded to the same ditch cannot be litigated or settled in the adjudication proceedings is well settled in this State.[25] Hence we cannot agree with counsel for appellants that the former decree was *res judicata* as to the ownership of the priorities of the main ditch as between the original appropriators thereof or their grantees." In another case: "The original decree awarding the priority of course does not determine the rights of the several owners of the ditch or the water as between themselves. It does not and could not determine the amount of the appropriation of each individual. The only authority which the court had in the premises was to render a decree fixing the amount of the appropriation to which the ditch was entitled and the date of its priority."[1]

The statutory proceedings in Colorado apply only between ditches, and the decrees thereunder do not and cannot determine the rights *inter se* of several users from the same ditch.[2] A decree under such proceedings adjudicating as to rights between co-owners is void. The proper proceeding is an action to quiet title,[3] the court saying: "The object of these statutory proceedings is to determine the relative priorities of the different ditches in the water district, and that the rights of the owners of a ditch, as between

[22] Putnam v. Curtis, 7 Colo. App. 437, 43 Pac. 1056; Hallett v. Carpenter, 37 Colo. 30, 86 Pac. 317.

[23] Farmers' Co. v. Riverside Irr. Dist., 14 Idaho, 450, 94 Pac. 761. Cf. Creer v. Bancroft W. Co., 13 Idaho, 407, 90 Pac. 228.

[24] Park v. Park (1909), 45 Colo. 347, 101 Pac. 406.

[25] Citing Putnam v. Curtis et al., 7 Colo. App. 437, 43 Pac. 1056; Oppenlander et al. v. Left Hand Ditch Co. et al., 18 Colo. 142, 31 Pac. 854; Hallet v. Carpenter et al., 37 Colo. 30, 86 Pac. 317; Evans v. Swan et al., 38 Colo. 92, 88 Pac. 149; O'Neil et al. v. Ft. Lyon Canal Co. et al., 39 Colo. 487, 90 Pac. 849.

[1] Woods v. Sargent, 43 Colo. 268, 95 Pac. 932, holding also that "The grantor's rights in this water were measured by the adjudication proceedings, and the defendant could procure from his grantor no greater rights than the grantor himself possessed."

[2] Evans v. Swan, 38 Colo. 92, 88 Pac. 149.

[3] *Ibid.*, and Combs v. Farmers' etc. Co., 38 Colo. 420, 88 Pac. 396.

themselves, cannot be determined therein.[4] So that, even had the decree of 1889 expressly adjudicated to the plaintiffs the right, as against their co-owners, to the use of a certain quantity of water from either of the ditches in controversy, it would have been void, as not within the issues."[5] And in a recent case the court says:[6] "The proceeding does not contemplate that there shall be an adjudication of the relative rights of the owners or consumers of water under any particular ditch, as between themselves, but only the relative priorities of the ditches, canals or reservoirs."

But the court makes a concession in holding the decree also *res adjudicata* as against the consumer-appropriator. The court holds that by a decree against the carrier a consumer is bound so as to prevent him afterward asserting in an independent proceeding (action to quiet title) an individual priority that would take precedence over rights given by the decree to other carriers.[7] The court concludes that this concession as to the decree directly affecting the rights of consumers is absolutely necessary in order to avoid throwing away all previous litigation wherein only the rights of the carrier were regarded as involved, but it leaves the matter in some confusion. In a recent case the court says: "It has frequently been decided in this State that the decrees under the adjudication statutes determine the priorities and the amount of appropriations to the several ditches in the irrigation districts in which such decrees are entered, and are not intended to designate the person or persons entitled to the use of water thus appropriated.[8] As aptly stated in the latter case: '*While no ascertainment is made as to who are consumers under any particular ditch, necessarily the relative rights of ditch-owners and all consumers are determined.*'[9] This rule, however, is intended to govern contentions between different ditch-owners taking water from the same stream, and does not determine the rights of the consumers in a ditch as between themselves, nor determine their relative priorities, and the decree in this case determines only the priority and the amount of appropriation to the ditch as such, and does not attempt to deter-

4 Citing Oppenlander v. Left Hand Ditch Co., 18 Colo. 142, 31 Pac. 854; Putnam v. Curtis, 7 Colo. App. 437, 43 Pac. 1056, and Long on Irrigation, sec. 99.

5 Evans v. Swan, 38 Colo. 92, 88 Pac. 149.

6 Combs v. Farmers' etc. Co., 38 Colo. 420, 88 Pac. 398.

7 Combs v. Farmers' Ditch Co., 38 Colo. 420, 88 Pac. 396.

8 Citing Farmers' Ind. Ditch Co. v. Agricultural Ditch Co., 22 Colo. 513–524, 55 Am. St. Rep. 149, 45 Pac. 444; Oppenlander v. Left Hand Ditch Co., 18 Colo. 142, 31 Pac. 854; Combs v. Farmers' High Line Canal & Res. Co., 38 Colo. 420, 88 Pac. 396.

9 Italics ours.

mine the rights of the consumers, excepting incidentally as against other ditch-owners; neither does it attempt to attach the priorities to any particular lands." [10]

It is also held that though on adjudicating water-rights in a water district a court could not determine the amount of the appropriation of each individual, and could only fix the amount to which the respective ditches were entitled, yet evidence, etc., taken before the referee and relating to a particular ditch, is admissible in an action to determine the respective rights of the owners of the ditch.[11]

Probably the rule confining the adjudication proceedings to the rights of the carrier-appropriator points out a weakness in the rule that the consumer is also an appropriator from the natural resource. It is seen that he is only so "*sub modo*," and not for all purposes, so that confusion has undoubtedly resulted.

(3d ed.)

§ 1230. **Scope of Proceedings.**—To enforce decreed rights, the irrigation officials of the State, of the water division, and of the water district, may be joined with the other appropriators as defendants,[12] and all persons whose rights might be affected are entitled to be made parties.[13]

Priorities cannot be awarded to ditches for irrigation of lands out of the State,[14] nor to rights in more than a single water district in each proceeding.[15] As between different water districts, the proceedings adjudicate for each district separately, and in distributing the water in enforcement of the decrees between different districts, the decrees in each district are taken together as a single decree

[10] O'Neil v. Fort Lyon etc. Co., 39 Colo. 487, 90 Pac. 849.

[11] Woods v. Sargent, 43 Colo. 268, 95 Pac. 932.

[12] Farmers' etc. Co. v. Agricultural etc. Co., 22 Colo. 513, 55 Am. St. Rep. 149, 45 Pac. 444. Cf. Boulware v. Parke, 4 Idaho, 692, 43 Pac. 680.

[13] Nichols v. McIntosh, 19 Colo. 22, 34 Pac. 278. In an action to enjoin irrigation officers from enforcing an order closing plaintiffs' headgates and diverting the water to other consumers, the other consumers were indispensable parties to the action, since the judgment would determine their rights to the water as against plaintiffs, and they should have been brought in under Mills' Annotated Code, section 16, requiring the court to order other parties brought in where a complete determination cannot be had without their presence. Not having been brought in, the decree cannot bind them. McLean v. Farmers' etc. Co., 44 Colo. 184, 98 Pac. 16.

[14] Lamson v. Vailes, 27 Colo. 201, 61 Pac. 231. Compare Turley v. Furman (N. M.), 114 Pac. 278.

[15] Sterling Irr. Co. v. Downer, 19 Colo. 595, 36 Pac. 787. But see Louden Irr. Co. v. Handy Ditch Co., 22 Colo. 102, 43 Pac. 535; Lower Latham Co. v. Bijou Co., 41 Colo. 212, 93 Pac. 483.

for that district. "This court has held that the decrees of the several districts taking water from the same general source are *prima facie* evidence as between such districts. We have also decided that it is the duty of the superintendent of irrigation for a water division to distribute the waters of the streams of his division in accordance with the adjudication decrees of the water districts included therein, so that, in effect, the various decrees in a water division are to be treated as one, and water distributed accordingly." [16]

An appropriator in a different district from that in which a decree is rendered must, it appears, intervene or else be bound by the decree as much as those within the district where it is rendered. He is bound, probably, not by the decree (not having been served with process), but by the four years' statute of limitation referred to in the following passage: "The State had the power to provide reasonable means for determining rights to the use of water, and to require all persons claiming such rights to present them in a prescribed manner, within a prescribed period, and to provide that all such claims not thus presented should be barred. Parties to adjudication proceedings in one district are bound to take notice of the rights adjudicated in other districts whereby rights are fixed in the same stream, although they are not adjudicated in the same action and in a common forum. They are bound to know that water from such a stream will be distributed according to the several decrees fixing rights therein, in the same manner with respect to priority and volume as though such several decrees were, in fact, one, because the law provides that the water shall be so distributed. For the statutory period the priorities of such districts are, as between the respective appropriators therein, but *prima facie* evidence of the rights of such appropriators, but after the lapse of four years from the date a decree is rendered fixing such priorities, unless suit is theretofore brought, they become conclusive. . . . . " [17] But a later case holds that decrees in one district do not always bind persons in another district who were not parties thereto.[18]

A decree permitting change of point of diversion should not be made until the volume of the changer's appropriation is first ascertained in cubic feet per second.[19] But in the same proceeding to

[16] Fort Lyon etc. Co. v. Arkansas etc. Co., 39 Colo. 332, 90 Pac. 1023.

[17] Fort Lyon etc. Co. v. Arkansas etc. Co., 39 Colo. 332, 90 Pac. 1023.

[18] Johnson v. Sterling Irr. Co. (Colo.), 113 Pac. 496.

[19] Bates v. Hall, 44 Colo. 360, 98 Pac. 3.

determine priority, the right to change the point of diversion, which, in Colorado, requires suit in court, may be determined.[20] "The object of the proceeding under the adjudication statute is to determine the amount and date of the appropriations of water to which the ditch is entitled, and the title to the ditch or the rights of any of the consumers of water from the ditch are entirely foreign to the issue, but after the appropriations have been determined and settled, and the owner of any portion thereof desires to change the point of appropriation, as he is entitled to, the question as to the amount of his interest is material, and must be determined at the time or before the change is permitted. There is no good reason why this may not be done in one proceeding. It would avail the other parties interested nothing to compel the petitioner to proceed first to have his specific rights determined, and then in a separate proceeding to secure the right to change the point of diversion. It is contrary to the principles of equity and good sense to compel parties to engage in two suits at law or equity when the whole matter can be determined in one. Equity as well as good conscience abhors a multiplicity of actions." [21]

The question of exchange of water between the same or different owners of reservoirs or change of place of storage cannot be determined in a statutory action to establish relative priorities of rights to store water in reservoirs within the district.[22] Nor can a decree award to any reservoir more than one filling for each priority held by it, so that if one reservoir holds more than one priority, the award must be for fillings at the varying times of these priorities, and not for a number of consecutive fillings at one time.[23]

A decree settling rights does not prevent thereafter the drainage of mine water into a decreed stream and taking it out again at some other point for irrigation. Rights in such new water are not affected by the decree.[24]

(3d ed.)

§ 1231. **Form of Decree, Costs, etc.**—There has been a tendency in Colorado to measure the amount awarded to the appropriator

[20] See *supra*, sec. 506.

[21] Hallet v. Carpenter, 37 Colo. 30, 86 Pac. 317.

[22] Windsor Res. Co. v. Lake Supply Co., 44 Colo. 214, 98 Pac. 729.

[23] *Ibid.*, explaining and modifying Cache La Poudre Res. Co. v. Water Co., 25 Colo. 161, 71 Am. St. Rep. 131, 53 Pac. 331, 46 L. R. A. 175; Same v. Same, 27 Colo. 532, 62 Pac. 420.

[24] Ripley v. Park etc. Co., 40 Colo. 129, 90 Pac. 75. See *supra*, sec. 38 et seq.

by the capacity of his ditch and not by the amount used. This is an application of the original "possessory right" theory of appropriation that beneficial use was not matter precedent to the appropriation, but matter subsequent, operating by way of abandonment.[25] Since only rights of distributor-appropriators (carriers or companies) are decreed, the amount actually used probably varies according to the number and varying necessities of its customers, and to limit the company's right to the amount used at the time the decree is given would prevent the company developing the region it supplies so as to later, by increasing settlement, increase the use to the full capacity of its plant.[1] Consequently the decree is usually in the form of decreeing to the capacity of the ditch, but it has more recently been held that the decree must be expressly based on beneficial use, or else that will be implied and read into the decree.[2] The Idaho statute[3] requires the amount and time for future application and use of the water, in case a claim is made for future needs, to be fixed by the decree, and this has been enforced in the Federal court.[4]

Decrees are required to be numbered, but lack of numbering does not open the decree to collateral attack.[5]

Costs are usually placed upon the parties. "Every person who appropriates water under the laws of this State (Idaho) must remember that it is sure to cost something for a final adjudication of such rights, and that they must pay the costs,"[6] in which case the State Engineer's services covering 200,000 acres amounted to $11,000. The trial jury may order surveys made, the cost thereof being apportioned among all the parties, and a cost bill need not be filed.[7] In a suit to determine priorities, the trial judge may order surveys made, the cost thereof ($11,000 in this case) to be apportioned among all the parties, and a cost bill need not be filed.[8] Cost of State Engineer's maps is properly charged to liti-

25 *Supra*, sec. 139.

1 *Supra*, sec. 483 et seq.

2 X. Y. etc. Co. v. Buffalo etc. Co., 25 Colo. 529, 55 Pac. 720; Medano etc. Co. v. Adams, 29 Colo. 317, 68 Pac. 431; Woods v. Sargent, 43 Colo. 268, 95 Pac. 932; Drach v. Isola (Colo.), 109 Pac. 748; and other cases cited *supra*, sec. 642, and *infra*, sec. 1233.

3 Stats. 1903, p. 250, sec. 38.

4 Trade etc. Co. v. Fraser, 148 Fed. 587, 79 C. C. A. 37.

5 Lake Fork etc. Co. v. Haley, 28 Colo. 513, 67 Pac. 158.

6 Boise etc. Co. v. Stewart, 10 Idaho, 38, 77 Pac. 25, 321. See, also, Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

7 Farmers' Co. v. Riverside Irr. Dist., 14 Idaho, 450, 94 Pac. 761.

8 Farmers' Co. v. Riverside Irr. Dist., 14 Idaho, 450, 94 Pac. 761.

gants in proportion to the amount of water decreed to each.[9] In Utah, costs are made a lien upon the land and water of the parties, to be collected like taxes.[10]

The Idaho statute requires the decree to declare the right appurtenant to specific land, but in certain cases this is held not to apply.[11] Likewise in a Colorado case a decree fixing the volume of water in a ditch and the rights of the owners was held not void for failure to also fix the acreage under the ditch.[12]

In Colorado, the order in which the names of the claimants are recited in the decree does not denote that priorities are necessarily in that order.[13] A decree which is altered before entry is inadmissible in evidence.[14] On appeal, the provisions of the statutes for filing transcripts and proof of service are mandatory.[15]

(3d ed.)

§ 1232. Effect of Decree—Time Limitations.—The decrees are open to direct attack like other decrees, for the power of the district court over its decrees in these matters is coextensive with that which any court possesses over its judgments or decrees.[16]

Parties to the proceedings desiring a review of the decree are required by statute to make their request for a review within two years in Colorado.[17] This applies to all rights the parties claimed. "Where a claimant of a priority to the use of water for irrigation appears in a statutory proceeding for the adjudication of such priorities, and files a statement of his claim, the decree thereunder is *res judicata* as to him and his rights, though he neglects to offer proofs; and unless, within the statutory period of two years, he applies for a review, he may not thereafter, in any proceeding or action, be heard to object to the same."[18] And this applies, even though they had a water-right which they omitted to claim.

[9] Farmers' etc. Co. v. Riverside Irr. Dist. (1909), 16 Idaho, 525, 102 Pac. 481.

[10] Utah Comp. Laws 1907, sec. 1285, as amended by Stats. 1911, c. 3, p. 2.

[11] Farmers' Co. v. Riverside Irr. Dist., 14 Idaho, 450, 94 Pac. 761.

[12] Bates v. Hall, 44 Colo. 360, 98 Pac. 3.

[13] Park v. Park, 45 Colo. 347, 101 Pac. 403.

[14] Bates v. Hall, 44 Colo. 360, 98 Pac. 3.

[15] Needle Rock etc. Co. v. Crawford etc. Co., 32 Colo. 209, 75 Pac. 424. See Magill v. Hyatt, 20 Colo. App. 524, 80 Pac. 472, concerning the form of the decree.

[16] Peterson v. Durkee, 15 Colo. App. 258, 62 Pac. 370.

[17] M. A. S. 2421, 2425; Rev. Stats. 1908, sec. 3318.

[18] Crippen v. X. Y. Z. Ditch Co., 32 Colo. 447, 76 Pac. 797, construing M. A. S., secs. 2421, 2425.

In a case where one had been properly made a party but did not set up his claim, the court held that "as to parties to such proceedings, the decree is *res adjudicata*, and unless impeached for fraud, or application for a review thereof is made by the parties within two years, the provisions of the decree are final and binding, at least as to them."[19] A recent case[20] says: "The decree when first entered is not final, because we find provisions for reargument and review, and for appeals.[21] Notwithstanding these provisions, however, the decrees are *res adjudicata* between those who were parties to, or participated in, the proceedings in which such decrees were rendered, and can only be attacked, reviewed or modified in the manner provided by law.[22] Section 2434 does not permit one who was a party to an adjudication proceeding to maintain an independent action against another party to such a proceeding for the purpose of fixing rights different from those determined in the adjudication proceedings, because such proceedings are, as to such parties, *res judicata*."[23]

Persons who were not parties to the proceedings, however (not having been validly served with process nor voluntarily appearing), are not bound by the two years' limitation, since that applies only to the parties. As to persons who were not parties the limitation is four years.[24] Within the four years it was held that, subject to the general equity rule of laches, an independent suit may be brought covering the same matter as the adjudication decree;[25] and it may be upon principle that until the statute of limitations has run, persons not parties may ignore the decree.[1] But later decisions seem to hold that even persons who were not parties cannot

[19] Broad Run Co. v. Devel. etc. Co., 47 Colo. 573, 108 Pac. 755, citing Louden Irr. Canal Co. v. Handy Ditch Co., 22 Colo. 102, 43 Pac. 535; Ditch Co. v. Ditch Co., 22 Colo. 115, 43 Pac. 540; New Mercer Ditch Co. v. Armstrong, 21 Colo. 357, 40 Pac. 989; Crippen v. X. Y. Irr. D. Co., 32 Colo. 447, 76 Pac. 794; Montrose Canal Co. v. Loutsenhizer Co., 23 Colo. 233, 48 Pac. 532; Fort Lyon Co. v. Arkansas etc. Co., 39 Colo. 332, 90 Pac. 1023.

[20] Fort Lyon Co. v. Arkansas etc. Co., 39 Colo. 332, 90 Pac. 1023.

[21] Citing 1 Mills' Ann. Stats. secs. 2425, 2427.

[22] Citing Louden Canal Co. v. Handy Ditch Co., 22 Colo. 102, 43 Pac. 535.

[23] Citing Montrose Canal Co. v. Loutsenhizer D. Co., 23 Colo. 233, 48 Pac. 532; Handy D. Co. v. South Side D. Co., 26 Colo. 333, 58 Pac. 30; Cons. Home Supply D. & R. Co. v. New Loveland & Greeley Irr. & L. Co., 27 Colo. 521, 62 Pac. 364; Crippen v. X. Y. Irr. Co., 32 Colo. 447, 76 Pac. 794.

[24] M. A. S. 2434; Rev. Stats. 1908, secs. 3313, 3314.

[25] Greer v. Heiser, 16 Colo. 306, 26 Pac. 770; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. 278; Putnam v. Curtis, 7 Colo. App. 437, 43 Pac. 1056. See, also, Waterman v. Hughes, 33 Colo. 270, 80 Pac. 891.

[1] *Supra*, sec. 625 et seq.

within the four years reopen decrees as to any matter within the scope of the decree, or which might have been determined in the original suit,[2] nor can the special proceeding be had; the independent suit can involve only matters outside the scope of the original decree.[3] Nor can they be reopened or an independent suit be brought after the four years have expired.[4] After four years the decree is binding upon the whole world as to all matters within the issues.

In Utah the statute provides that failure to file claim within six months is a complete bar, unless the claimant did not receive actual notice, in which case the court may extend the time to one year, publishing notice of the request for extension.[5]

(3d ed.)

§ 1233. **Same—Res Adjudicata.**—The decrees are not open to collateral attack.[6] They are conclusive upon the parties.[7] It has been frequently determined by the Colorado court that except as specially provided by statutes, or in case of fraud, decrees rendered in statutory proceedings under the irrigation act are *res adjudicata* and conclusive upon the parties thereto and issues therein.[8] This

2 Handy etc. Co. v. Southside etc. Co., 26 Colo. 333, 58 Pac. 30; Upper Platte etc. Co. v. Fort Morgan etc. Co., 27 Colo. 214, 60 Pac. 484; Boulder etc. Co. v. Lower etc. Co., 22 Colo. 115, 43 Pac. 540; Montrose etc. Co. v. Loutsenhizer, 23 Colo. 233, 48 Pac. 522.

3 *Dictum*, Broad Run Co. v. Denel Co., 47 Colo. 573, 108 Pac. 755, saying: "In Nichols v. McIntosh, 19 Colo. 22, 34 Pac. 278, and Greer v. Heiser, 16 Colo. 306, 26 Pac. 770, there may be expressions inconsistent with what is here decided; but, if so, such former observations, or holdings, have been modified or superseded by our later cases, some of which are referred to in this opinion, and which are in entire harmony with the conclusions herein reached."

4 Mills' Annotated Statutes, sections 2434, 2435, providing that, after four years from the rendering of a final decree in any water district adjudicating rights to waters for irrigation therein, all persons shall be forever barred from setting up any claim to priority of rights to water for irrigation in such district adverse or contrary to the effect of such decree, bars an independent action to determine the relative rights of canals drawing water from the same stream after the lapse of four years from the respective adjudication decrees, where their respective priorities have been regularly determined in different statutory proceedings in different water districts, though only one of the canal companies was a party to the proceeding, and only the other company to the other proceeding. Fort Lyon etc. Co. v. Arkansas etc. Co. (Colo.), 90 Pac. 1023. Accord, Broad Run Co. v. Denel Co., *supra*. But see Johnson v. Sterling etc. Co. (Colo.), 113 Pac. 496.

5 *Infra*, sec. 1447.

6 Cases just cited.

7 Farmers' Union Ditch Co. v. Rio Grande Canal Co., 37 Colo. 512, 86 Pac. 1042; Laguna Co. v. Rocky Ford Co., 42 Colo. 522, 95 Pac. 287.

8 Kerr v. Burns, 42 Colo. 285, 93 Pac. 1121; Farmers' etc. Co. v. Rio Grande etc. Co., 37 Colo. 512, 86 Pac. 1042, citing New Mercer D. Co. v. Armstrong, 21 Colo. 357, 40 Pac. 989; Louden Canal Co. v. Handy D. Co., 22

was applied in one case,[9] where the decree was held binding, though not numbered. The decree is *res adjudicata* upon the question of abandonment prior to the decree.[10] The district courts of Colorado act as courts of general jurisdiction in these matters, whose jurisdictional requirements will be presumed on collateral attack on their decrees.[11] The reason for holding this is given in the latter case: "Water-rights are of the first importance to the farmers of this State. Without them farms are of but little value. Relying upon the title to water-rights evidenced by adjudication proceedings, farmers have brought their lands under cultivation and expended large sums of money, as well as labor, in making improvements. To now deprive them of these rights would despoil them of the benefits of their expenditures and years of labor. To impose upon them, in case of collateral attack, the burden of showing affirmatively that all steps had been taken to authorize the court to render the decree relied upon would in many instances work this result. While it is true that under the doctrine of some jurisdictions the district courts of this State, in adjudicating water-rights under the statute, would be held courts of limited jurisdiction, we prefer to adopt the rule, supported by abundant authority, that our district courts in such proceedings are courts of general jurisdiction, and thus protect the claimants of adjudicated water-rights from the possibility of losing the fruits of their toil by the neglect or inadvertence of persons for which they are not responsible."[12] A decree establishing priorities cannot be attacked in a later proceeding for change of point of diversion.[13] The presumption is that the decreed rights continue in existence until a court of competent jurisdiction in an appropriate action has otherwise determined.[14] The decree is *in rem,* and cannot be enforced by contempt proceedings against one who prevents the water commissioner from enforcing it,[15] and may be enforced by *mandamus* against the water commissioner.[16] It is *res adjudicata* upon riparian owners claiming "meadow" ap-

Colo. 102, 43 Pac. 535, 540; Montrose Canal Co. v. Loutsenhizer Co., 23 Colo. 233, 48 Pac. 532.

9 Lake Fork etc. Co. v. Haley, 28 Colo. 513, 67 Pac. 158.

10 O'Brien v. King, 41 Colo. 487, 92 Pac. 945.

11 Farmers' etc. Co. v. Rio Grande etc. Co., 37 Colo. 512, 86 Pac. 1042.

12 Farmers' etc. Co. v. Rio Grande etc. Co., 37 Colo. 512, 86 Pac. 1042.

13 Wadsworth etc. Co. v. Brown, 39 Colo. 57, 88 Pac. 1060.

14 Lower Latham etc. Co. v. Bijou etc. Co., 41 Colo. 212, 93 Pac. 483.

15 Roberson v. People ex rel. Soule, 40 Colo. 119, 90 Pac. 79.

16 Boulder etc. Co. v. Hoover, 48 Colo. 343, 110 Pac. 75; Northern etc. Co. v. Pouppirt, 47 Colo. 490, 108 Pac. 23.

propriations arising out of natural subirrigation; such owners must build a ditch and make claim in the adjudication proceedings or be barred like other claimants.[17]

But the decree is *res adjudicata* between the parties and issues only, however, and not upon persons not made parties,[18] nor as to rights of actual parties of which no issue was made. A judgment that a certain reservoir is senior to another is not conclusive against owners of other reservoirs, nor even between those two as to other reservoirs of their own.[19] At least, not until the operation of the statutes of limitation mentioned in the preceding section. While *res adjudicata* upon all questions of abandonment or quantity prior to the decree,[20] it does not affect abandonment subsequent thereto, since the decreed right may be lost in whole or in part by subsequent nonuse,[21] and evidence of nonuse prior to the decree will be received as evidence of such subsequent abandonment.[22] Matters not adjudicated by the decree, or arising subsequent thereto, or demanding protection of decreed rights, may be sought in an independent proceeding.[23] The ordinary equity jurisdiction remains to enjoin in subsequent independent suits acts violative of an adjudication decree.[24]

Rights not complete at the time the decree is rendered, the work being still in progress, are left open by the decree. The decree is not *res adjudicata* as to them.[25] And a recent case holds that every decree based upon capacity of ditch is within this rule, and does not become final until beneficial use is actually made. In this case

17 Broad Run Co. v. Deuel Co., 47 Colo. 573, 108 Pac. 755.

18 McLean v. Farmers' etc. Co., 44 Colo. 184, 98 Pac. 16.

19 Windsor Res. Co. v. Lake Supply Co., 44 Colo. 214, 98 Pac. 729. See, also, Evans v. Swan, 38 Colo. 92, 88 Pac. 149. See *supra*, sec. 625 et seq., "unrepresented interests."

20 O'Brien v. King, 41 Colo. 487, 92 Pac. 945.

21 Alamosa etc. Co. v. Nelson, 42 Colo. 140, 93 Pac. 1121; Drach v. Isola, 48 Colo. 134, 109 Pac. 748; New Mercer etc. Co. v. Armstrong, 21 Colo. 357, 40 Pac. 989; Boulder etc. Co. v. Leggett etc. Co., 36 Colo. 455, 86 Pac. 101.

22 Alamosa Co. v. Nelson, 42 Colo. 140, 93 Pac. 1121.

23 Buckers etc. Co. v. Farmers' etc. Co., 31 Colo. 62, 72 Pac. 49. Cf. Montrose etc. Co. v. Loutsenhizer etc. Co., 23 Colo. 233, 48 Pac. 532.

24 Kerr v. Burns, 42 Colo. 285, 93 Pac. 1121.

25 Conley v. Dyer, 43 Colo. 22, 95 Pac. 304. In Waterman v. Hughes, 33 Colo. 277, 80 Pac. 891, it is said: "We have decided that in these special proceedings the court is without authority to award to a ditch or canal in advance of its completion any definite quantity of water. Water etc. Co. v. Tenney, 24 Colo. 344, 352, 51 Pac. 505. But we have not decided that it is wrong for the court to fix the date of the priority of a canal begun, but not completed, at the time the decree is rendered. This is precisely what was done under the decrees we are considering, and we see no objection to it from a jurisdictional standpoint."

a party had been (in 1889) decreed three and two-tenths second-feet of water, being the capacity of his ditch and the requirement of his irrigable land; but he had only a part thereof under actual irrigation and was using only one and six-tenths second-feet at the time. It was held some twenty years later that his right could be inquired into again to limit it to the amount used at the later date; that a decree based upon capacity of ditch is always conditional.[1] This seems to go far in diminishing the force of decrees as *res adjudicata.*

In Idaho, a statute of this year (1911) provides a summary procedure to establish *prima facie* evidence of rights which former decrees had omitted, or which arose subsequent thereto, and were consequently not bound thereby.[1a]

(3d ed.)

§ **1234. Conclusion.**—We have set forth this matter at some length because this State (Colorado) is the originator of this plan of having all water-rights in the State put through a process of adjudication in court, and to show the large amount of purely technical litigation that has resulted. It is said[2] that prior to the passage of the Irrigation Acts of 1879 and 1881 this State was sparsely inhabited—not nearly all of the agricultural lands had been brought under cultivation by means of irrigation—and there had been few controversies; and these Irrigation Acts made it necessary for a large number of people to assert and defend their rights against their neighbors when, in fact, their rights had never been questioned; that excess decrees were frequent, tended to speculation in water, and sometimes resulted in fraud by collusive suits. This is surely much exaggerated, but as other States have recently passed statutes following the Colorado idea, the difficulties inherent in throwing water-rights into wholesale litigation should be borne in mind, and avoided, if possible. A Colorado author[3] complains that the decree may, in effect, be an authorization of waste in case the crops are changed to one needing less than the decreed amount of water, or where, because of continued soaking of the land, the seepage and evaporation take up less of the water. The decree is intended to fix a definite constant quantity for the use of each ap-

1 Drach v. Isola, 48 Colo. 134, 109 Pac. 748; Crawford Clipper D. Co. v. Needle Rock D. Co. (Colo. 1911), 114 Pac. 655. See *supra,* sec. 1231.

1a *Infra,* sec. 1435.

2 Bulletin 58, U. S. Dept. Agr., Ex. Stat., p. 29.

3 Long on Irrigation.

propriator, but beneficial use cannot be a constant factor in the nature of things.[4] In a recent case the Colorado court says:[5] "It was a new field, and, in the light of experience, we can, perhaps, point out many imperfections in these statutes, but they have been upheld by the courts and acquiesced in by the people for more than a quarter of a century."[6]

Reference should also be made to the preceding chapters.

(3d ed.)

§ 1235. Comments of Department of Agriculture.—Concerning the practical operation of these statutes, dealt with in this and the preceding chapter, some quotations are given from Bulletin 168 of the United States Department of Agriculture.[7]

Colorado.—"Most of the rights in Colorado have been defined under this special form of procedure, but there is continuously arising litigation to settle points which had not arisen at the time the decrees were rendered. . . . . Many of the decrees are indefinite, making it necessary for the commissioners to interpret them. Most of them have awarded to some of the ditches more water than has ever been diverted by them, while in theory the owners of a ditch are entitled to no more water than they have put to beneficial use."

Utah.—"One of the greatest drawbacks is the time consumed. If the surveys of a single stream are to occupy the time of the engineer and his assistants six years, it will take a great many years to adjudicate the rights of the streams of the State. This new law did not repeal the old law, under which in any water-right suit all parties claiming rights to the same source may be made parties to the action. It is quite likely that in the years that must elapse before the rights throughout the State are defined under the new law many will be defined in the old way."

Wyoming.—"The superintendents have never been able to keep up with this work, and there are a great many ditches which have

[4] See Drach v. Isola, 48 Colo. 134, 109 Pac. 748, for a strong illustration of this.

[5] Fort Lyon etc. Co. v. Arkansas etc. Co., 39 Colo. 332, 90 Pac. 1023.

[6] In McLean v. Farmers' etc. Co., 44 Colo. 184, 98 Pac. 16, "it was long since deemed necessary by the legislature to provide a system of procedure by which the rights to the use of water for agricultural purposes could be authoritatively settled. In the light of experience, perhaps that system could be improved; but, considering the fact that it was enacted without the benefit of experience as a guide in formulating its provisions, it has proved to be reasonably satisfactory and practicable."

[7] Office of Experiment Stations, "The State Engineer and His Relation to Irrigation" (1906).

been completed and whose owners have notified the State Engineer of their readiness to submit proof of this fact, for which proof has not been taken. . . . . Most of the smaller streams of the State have been adjudicated, and some of the larger ones, but the large streams generally have not yet been taken up." [The State Engineer of Wyoming now reports that practically every stream has been adjudicated.] [8]

Generally.—"It appears, then, from a study of the operation of the laws for defining water-rights in the various States that so far the only effective means of securing a complete list is to have the work done by an administrative board or official, subject to review by the courts."

In a later publication the Department says: "The States which have adopted the Colorado system have tried to secure the principal advantage of the Wyoming system—speedy adjudication, and the collection of data, on which to base adjudications, by public officials —but without great success. The State Engineers or other officials were to bring actions for the adjudication of water-rights after the engineers had made surveys and collected all the information necessary for such adjudications, making the process similar to that in Wyoming, except that the decree was entered by the court rather than by the board of control. This provision has been adopted in several States and Territories, notably Utah, Idaho, the Dakotas, Oklahoma, and New Mexico, but without much success. . . . . [9] Summarizing what has been said: Eight States and Territories—Wyoming, Nebraska, Utah, Nevada, North Dakota, Oklahoma, New Mexico, and South Dakota—have provisions for forcing adjudications. In three of these States—Wyoming, Nebraska and Nevada—the adjudications are made by boards or officials, while in the others they are made by the courts in actions initiated by public officials. Three States—Idaho, South Dakota and Oregon—provide for surveys and the collection of data by public officials for use in adjudications when these are initiated by parties claiming water-rights. In Idaho and South Dakota these adjudications are made by the courts, and in Oregon by an administrative board. In the other seven arid and semi-arid States adjudications are made by the courts on the testimony presented by the contending parties." [10]

[8] 10th Rept. (1909–10), p. 11.

[9] Report for 1909 of Office of Experiment Stations, p. 400.

[10] *Ibid.*, p. 402.

The State Engineer of Oregon reports that in Wyoming, up to 1905, over five thousand ditch rights were determined by the Board of Control. But seven appeals to the courts were taken from these decisions, and such appeals affected less than fifty ditches. The cost to the ditch-owner for this service was one dollar and seventy-five cents for each ditch. He further reports that the cost to the public for adjudications in Wyoming during the past two years, assuming the board to have no other duties, was eleven dollars and forty-six cents per ditch right, or about ten cents per acre irrigated, as reported by Clarence T. Johnston, State Engineer, on October 22, 1908. These adjudications affected 2,172 rights to the use of water, and 210,290.73 acres. Not a single appeal to the courts has been taken in all this work. In Oregon he reports that sixty-six petitions for adjudication were filed up to the end of 1910, of which three were then completed to final decree at a cost of seven and seven-tenths cents per acre for surveys and eighteen cents per acre for taking evidence.[11]

[11] Report of 1909–10 of the State Engineer of Oregon, p. 7.

§§ *1236–1244.* (*Blank numbers.*)

PART VII.
DISTRIBUTION OF WATER.

CHAPTER 52.
INTRODUCTORY.

§ 1245. Purpose of this chapter.
§ 1246. Development of distributing systems.
§ 1247. Contract regulation.
§ 1248. Public ownership.
§ 1249. Public control without public ownership.
§ 1250. Conclusion.
§§ 1251–1259. (Blank numbers.)

(3d ed.)

§ **1245.** The subject to which the following chapters are devoted is developing rapidly. Our endeavor is to confine the book to a study of existing laws as worked out in legal authorities. It is confined chiefly to the authorities involving irrigation; and although there is much decision and statute upon water in cities, and still more upon other public services such as common carriers, yet the following chapters seldom attempt to go outside of the irrigation cases.[1]

(3d ed.)

§ **1246. Development of Distributing Systems.**—Most Western irrigation in former years was the individual work of each farmer taking water in his own ditch out of a stream independently, sometimes two or three neighbors joining in a partnership ditch or as tenants in common. But facilities for this cheap installation have for some years been pretty much in full use; new development has been proceeding along the less accessible sources, requiring engineering on a large scale and heavy financial investment,

[1] Acknowledgment is made to the Columbia Law Review, to which the author contributed the matter contained in the following introductory chapter. (X Columbia Law Review, 506, for June, 1910.) Some revision has been made in reprinting it here.

compared to which the simple farmer's ditch, which formerly held the field, is primitive.[2] As a result, new settlers have been dependent upon distributing agencies for water supply; and where the successful cultivation of land depends upon irrigation, the water supply is the largest element of value of the land.

"The law in practice" leaves terms of service much to individual contract, which means to the control of the distributor.[3] This has been due partly to the doctrine of "*laissez faire*" heretofore prevailing throughout the country, and partly to the practical difficulties in promoting settlement in frontier regions. Arid wastes, to be settled by irrigation, require the energy of the pioneer promoter; he is welcomed and encouraged; sentiment does not favor restricting development; and this is still much the popular attitude; the development corporation in a new region is not out of favor with the people there because of conservation. On the other side, the necessity for securing settlers made encouraging terms to settlers essential, and they have, as a rule, prospered and got along well with the distributor; economic causes brought that about, whatever the law might be. Rather than advantage being taken of settlers, the history has been that more favorable terms were offered to them than could be sustained; and bankruptcy of the earlier companies is only too common, especially where the company relied for its profit on selling water, without sharing in the increased value of the lands irrigated from the system.[4]

While individual contract has thus been the practice, yet the "law in the books," being just developing, has been uncertain.

2 "The building of a successful canal to-day not only requires engineering skill of a high order—which under most favorable circumstances is expensive—but in addition, the initial expenditure of much money, and I do not hesitate to say that at the present time there are no irrigation projects of any extent or promise in the State of Idaho that will not demand the investment of millions to insure even reasonable certainty and success." Colonel Hamer, of Idaho, in 45 Cong. Rec. (1910), p. 4763.

3 "The contracts under which such rights are secured and the regulations adopted by canal-owners stand in the place of water laws to the farmers." Water Supply Paper on the Duty of Water, United States Department of Agriculture, for 1909.

4 So, also, of power companies: "Hydro-electric properties have not, as a class, returned to the invester a succession of swollen dividends. The industry has hardly passed its experimental stages. Its securities are by no means the least precarious of those on sale in the exchanges. . . . . The industry is subject to the same exigencies as are other industries, and, except in a few cases, notwithstanding the testimony of many popular magazine articles, it bears no resemblance to Aladdin's lamp as a revenue producer. No industry will respond more readily to ill-advised and oppressive legislation; in none

There is much in the books looking to public control, but the authorities had difficulty in accepting it in the face of the almost universal practice. Moreover, confusing currents peculiar to Western water law have turned "the law in the books" somewhat toward public ownership as distinguished from public control.

The tendency toward public ownership is strongest in Colorado, Wyoming, and the interior States. California, in the books, after some uncertainty, seems now to stand upon the more conservative solution of public control without public ownership. The California law will be considered first.

(3d ed.)

§ 1247. **Contract Regulation.**—The common law of public service agencies is, since Munn v. Illinois,[5] familiar, being, in general terms, that property devoted to the public service or use is affected with the public duty of performing reasonable service to all; that to secure this end, rates and terms of service must be reasonable, and service is compulsory upon tender of a reasonable rate; that no unreasonable conditions may be required of consumers; that there must be no discrimination; that the courts will enforce these things, and it needs no statute to give them the power.[6]

In the early days in California, however (as elsewhere throughout the country), water had been distributed by companies of capitalists to miners for their sluices, and to mill-owners for power, and to towns for domestic uses,[7] and terms of service were established by contract between company and consumer. It was a tenet of statesmen and economists and of the country that government interference is destructive, especially when it interferes with industries still young and struggling for growth; and corporate irrigation was in its infancy in the sixties.[8] In the late sev-

must the burden fall more directly on the ultimate consumer. Any hydroelectric project requires special consideration during the early years of its development; a surprisingly large number either fail to pay dividends or become bankrupt during the first decade of their existence." United States Geological Survey, Water Supply Paper, 238, p. 6.

5 94 U. S. 113, 24 L. Ed. 77.

6 *Infra*, sec. 1262 et seq.

7 Reporter's statement in Titcomb v. Kirk, 51 Cal. 289, 5 Morr. Min. Rep. 10; Fresno Canal Co. v. Park, 129 Cal. 441, 62 Pac. 87.

8 Stanislaus County v. San Joaquin Co., 192 U. S. 201, 24 Sup. Ct. Rep. 246, 48 L. Ed. 406. Compare Cal. Stats. 1853, p. 87, as amended 1862, p. 540, regarding water rates in cities. In other States public regulation of water charges in cities had been provided for "long before the constitution of 1879 was adopted in California." Spring Valley W. W. v. Schottler, 110 U. S. 347, at 353, 4 Sup. Ct. Rep. 48, 28 L. Ed. 173.

enties and early eighties, rulings against this doctrine of *"laissez faire"* were undertaken, however. Munn v. Illinois had been recently decided (in 1876) to the effect that one who devoted his property to public use owes the public corresponding duties, even at common law, as above mentioned. To place this common-law doctrine where it would be beyond the control of the legislature, which (having been called together in the days of the Kearney excitement) the California constitutional convention distrusted—"To lay a strong hand upon these monopolies"[9]—a provision was (three years after Munn v. Illinois had declared such to be the common law) placed in the California constitution that "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law," which has been copied with occasional variation in the constitutions or statutes of numerous Western States.[10]

Nevertheless, the *"laissez faire"* principle has, as concerns irrigation, prevailed to the present day, and left the matter to individual contract arrangement. Although the duty of compulsory service has been uniformly upheld in California, yet in some Fresno cases the decisions upheld the validity of contracts fixing terms of service.[11] These cases upheld the validity of a contract making the water charges a lien upon the land supplied, and giving the company the right to foreclose upon the land upon default. Only in the Park case, the last of these, was the question of public restriction discussed, and there the opinion declared strongly that, in the absence of statute, there was no restriction upon the power of the public service company to regulate the terms of its service by private contract, or upon the conclusiveness of contracts so made.

At about the same time the United States circuit court for the southern California district had been dealing with the question, and, while its rulings were not wholly uniform, had inclined to the view of Mr. Justice Ross, Circuit Judge, that conditions or terms of service could not be made to rest upon contract, but upon rules of law for public service—by the common law if not laid

[9] People v. Stephens, 62 Cal. 209; Merrill v. Southside Irr. Co., 112 Cal. 426, 44 Pac. 720.

[10] *Infra*, sec. 1264.

[11] Fresno Canal Co. v. Rowell, 80 Cal. 114, 13 Am. St. Rep. 112, 22 Pac. 53; Same v. Dunbar, 80 Cal. 530, 22 Pac. 275; Same v. Park, 129 Cal. 431, 62 Pac. 87.

down by statute. For example, it was ruled that the company could not require the consumer, in addition to the rate, to pay a premium or bonus, as a price for a perpetual "water-right," since the law gave a perpetual right of service to everyone who tendered merely a reasonable rate.[12] But in San Diego Co. v. Souther,[13] the United States circuit court of appeals accepted the Park case in its support of regulation by contract. Unwillingly, Judge Ross thereupon held that the company could fix its rates by contract with each consumer; that the courts could not question them; and that they prevailed, although the public rate-fixing authorities subsequently established a lower rate.[14]

Thus the power of the public service company to fix conclusively the terms of its service by stipulations in contracts became accepted in California (at least in the absence of express action by the board of supervisors in regard to rates), although the constitution had declared the use a public one.

And yet, as already said, the California court has always upheld the common-law rule of compulsory service, and further, in a case decided in the same year as the Park case, and just after it, the court, in equally strong terms, denied the binding force of contracts fixing terms of service. In Crow v. San Joaquin Co.[15] damages were granted for shutting off water from a consumer who (payment not having been demanded in advance) was in arrears in paying the contract rate for a past year, but tendered the rate for the coming season. Though the contract for the previous years and the company's rules and regulations provided that "no land will be supplied with water unless all dues and claims for previous supply on that land have been paid," it was held without consideration, for it was the duty of the defendant company to furnish the plaintiff with water whether he agreed to the regulations or not, and "this rule precludes the idea that any other duties can be prescribed or imposed, except the tender of the rate [implying the tender of such rate as might be reasonable, in the absence of statutory rate-fixing] as a condition for supplying water, as required by law." It was held enough that plaintiff tendered the rate for the coming season; for the arrears the com-

12 These Federal cases are reviewed in Souther v. San Diego Co., 112 Fed. 228.

13 90 Fed. 164, 32 C. C. A. 548. See, also, S. C., 104 Fed. 706, 44 C. C. A. 143.

14 Souther v. San Diego Co., 12 Fed. 228, *supra*.

15 130 Cal. 309, 62 Pac. 562, 1058.

pany must seek other redress than shutting off the water. This much narrowed the field for the conclusiveness of contract conditions; but during the past ten years the Park case was regarded as the law.

Concurrently with this inconsistency in both State and Federal decisions, there was (and is) inconsistency in the statutes. They provide that the county boards of supervisors should fix rates,[16] and a charge of a higher rate should forfeit franchise and waterworks,[17], and that no contract should fix a rate higher than that fixed by the board of supervisors,[18] and that service at the rate so fixed is compulsory;[19] that in the absence of such public rate-fixing, service is compulsory at the rate generally charged by the distributor in the vicinity[20] [with the implication, clearly the rule at common law, that tender of a reasonable rate is sufficient, if the rates actually charged be excessive]. But, at the same time, they enact that public regulation by the board of supervisors shall not affect contracts made prior to the time such regulation is made;[21] and the waiver by the distributor of payment in advance shall be sufficient consideration for a contract[22] (evidently passed to overrule the Crow case), and generally that nothing shall prohibit or invalidate any contract already made or hereafter made.[23] These acts predominate in favor of conclusiveness of the terms of service fixed by the distributor in its contracts, although the constitution, to oppose such legislative action, had declared the use a public one, and its terms subject to State control.

Recently, however, the supreme court of California, in a case below referred to (constituting a return to the Crow case and the rulings of Judge Ross in the Federal court), has done much to clear the matter.

The foregoing shows the difficulty in superimposing public control upon a matter which has so long in practice been left to private arrangement. It is difficult to change the ways of people by constitution, legislation or court decision, and until recent years, general thought was for individual initiative and private control. Although the law stood "in the books" to the contrary,

16 Stats. 1880, p. 16; 1885, p. 95.

17 Stats. 1880, *supra.*

18 Stats. 1901, p. 331, sec. 2.

19 Stats. 1885, p. 95, secs. 8–10.

20 Stats. 1885, p. 95, sec. 5, as amd. 1901, p. 80.

21 Stats. 1901, p. 331, sec. 4.

22 Stats. 1901, p. 331, sec. 3.

23 Stats. 1885, p. 95, sec. 11½, added by Stats. 1897, p. 49.

it was ineffective because not in harmony with the then current thought.

Beside the foregoing regarding regulation by contract, the California law also presented problems in regard to the distinction between public control and public ownership, but before entering upon the California decisions in that regard it seems advisable to consider the trend of the law of Colorado, Wyoming and the interior States generally, which, in the books (although private contracts there, also, prevail in practice), lean toward public ownership, as distinguished from public control.

(3d ed.)

§ 1248. **Public Ownership.**—The constitution of Colorado declares, in words now copied by constitution or statute in most Western States (but not, until this year, in California),[24] "The water of every natural stream not heretofore appropriated, within the State of Colorado, is hereby declared to be the property of the public."[25] In Wyoming and some others, "the property of the State."[1] Fundamental questions are involved in the effect of this. Of most moment at the present writing is the conflict which has arisen between Federal and State advocates for control of water industries upon public lands. Less important now, but formerly of importance, was the question of the rights of the owners of riparian lands.[2] But the matter now in hand is the effect it has had toward public ownership of irrigation distributing works built by private capital.

The declaration of public or State ownership of waters has not been critically examined with the distinction between sovereignty and proprietorship in view in this connection. In other connections occasional decisions tended to construe the declaration as one of State sovereignty or regulative power as distinguished from actual ownership;[3] but in the matter now in view, the distinction has not, in any decision the writer can recall, been in mind; the declaration has been tacitly taken for what it says—State or public proprietorship or ownership of waters the same as in a public

[24] Since this was written, a similar declaration has now (1911) been enacted in California also. *Supra*, sec. 170.

[25] Const., art. 16, sec. 5.

[1] *Supra*, sec. 170.

[2] Regarding both these matters, see *supra*, Part II.

[3] *Supra*, secs. 170, 171. As to the distinction between State sovereignty and State ownership, see especially Moore v. Smaw, 17 Cal. 199, at 218, 79 Am. Dec. 123, 12 Morr. Min. Rep. 418.

building. The result has been in Colorado and the interior States to build a system of law of water distribution upon the basis that consumers from a distributing system are the real proprietors of the system, and the distributor or canal company but their agent to care for the works and bring the water to the consumers' land. The law of public service, resting upon the sovereign power to regulate, though mingled with the law of ownership, is thus subordinated; the consumers' rights are primarily worked out upon the basis that they are the real owners of the distributing system.

The first case in Colorado was Wheeler v. Northern Irr. Co.[4] The question was one of compulsory service without exaction of a premium or bonus for furnishing it, and Mr. Justice Helm worked it out chiefly upon the general law of public service companies, relying upon Munn v. Illinois. But he also refers to the Colorado constitutional provision above quoted, and declares that the distributor is not the owner of the right to the water, but is simply "an intermediate agency" and "engaged in the business of transporting, for hire, water owned by the public, to the people owning the right to its use." This has since been developed to to the rule, now general in the arid regions, that one receiving water for irrigation from a corporation has, to the extent of the water he receives, an actual "water-right" or freehold interest in real estate; that the consumers own the water-rights in the natural resources involved. The most succinct expression of this is in Wyatt v. Larimer etc. Co.,[5] where it is said: "The consumer under a ditch possesses a . . . . property. He is an appropriator from the natural stream, through the intermediate agency of the ditch, and has the right to have the quantity of water so appropriated flow in the natural stream, and through the ditch for his own use. . . . . We adhere to the doctrine that such a canal company is not the proprietor of the water diverted by it, but that it must be regarded as an intermediate agency existing for the purpose of aiding consumers in the exercise of their constitutional rights, as well as a private enterprise prosecuted for the benefit of its owners."

In other cases it is said: "By taking from its canal the consumer recognizes and ratifies its acts of construction and diversion, making them his own, and the situation, so far as this question is con-

[4] 10 Colo. 582, 3 Am. St. Rep. 603, 17 Pac. 487.

[5] 18 Colo. 298, 36 Am. St. Rep. 280, 33 Pac. 144.

cerned, is not different from what it would have been had the consumer in fact employed the carrier to construct the canal for himself alone."[6] Again, "The right to the use of water should never be separated from the land to which it is applied," and the canal company is but a means of conveyance having no ownership in the water-rights, saying "the irrigation company does not own the water; it is only the servant of the public to carry it to the land for which it has been appropriated."[7] In the end, when the number of consumers is up to full capacity, the company is then "without any further interest in the canal or water-right."[8] In Wyoming (and the recent Oregon statute following Wyoming) this is evidenced by the State Engineer giving to each consumer a "certificate of appropriation," which is the term used to designate that he has, in the flow and use of the natural stream from which the company's supply comes, the highest right recognized by law, equal to and probably displacing any right therein held by the company in initiating its plant.[8a] This idea that the consumers under a canal are, through the intermediate agency of the canal, the joint owners of the natural water resources involved, and that the distributor is not, predominates in the interior States.[9]

In some of the results of this public ownership view the law of public service is materially departed from in serious ways, the policy of which may be a matter of question. The consumer, having not merely a right of service but one of actual ownership, is governed by the law which has been developed for the use of natural streams. One feature of this has hitherto been independence of land and water; and so the consumer has been held to have the right to transfer his use from one place or purpose to another.[10] Another feature is that the general Colorado law of streams is based upon priority of right to the first who begins the use, and there is some tendency, in the absence of pro-rating contract, to apply this to consumers *inter se* in times of scarcity—the later consumer must stand the loss first while the prior one enjoys his full supply.[11]

[6] Helm, C. J., concurring in Farmers' etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. 1028, 4 L. R. A. 767.

[7] Farmers' Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. 286.

[8] Nampa Irr. Dist. v. Gess, 17 Idaho 552 (1910), 106 Pac. 993.

[8a] *Supra*, c. 18; *infra*, c. 57.

[9] *Infra*, sec. 1338 et seq.

[10] *Infra*, sec. 1346.

[11] *Infra*, sec. 1343 et seq.

A still more important result, however, is that above adverted to: When the number of consumers reaches the full capacity of the distributing system, the company drops out as owner and the system belongs wholly to the consumers by a common ownership, to be thereafter conducted upon a co-operative basis. There has, indeed, been a plan of organization seemingly of extensive use in Colorado, expressly providing in the consumers' contracts that when the number of consumers reaches the estimated capacity of the canal, the consumers as a body are entitled to an express conveyance of the canal and water system.[12]

Mention may be made also of the wide use of the "mutual" system of organizing companies expressly upon a co-operative basis, so that shares of stock represent specific rights to water service, and service is made only to stockholders. Such corporations are not organized for profit, the only cost to stockholders being (after the price of the stock) operation and maintenance. This type of organization has occupied a large field, owing especially to the fact that many companies organized for profit have gone bankrupt because of extravagantly favorable terms offered to consumers in the "boom" of promotion, and the consumers were forced to take over the systems themselves to protect their own interests. Most of the irrigation in Southern California (much of it, also, in Central California, Utah and Colorado) is done by mutual or co-operative companies. Mutual companies are not strictly within the class of public service companies, since they serve only particular private estates; but are so common that they form an important illustration of the tendency to have consumers own the irrigation systems which supply them.[13]

A specially noteworthy stride toward solving the problem of distribution to irrigators by a resort to public ownership is the rapid spread of the "Irrigation District" system; whereby the owners of land within a given district susceptible of irrigation from a common source of supply may, upon petition of a certain proportion thereof, form a *quasi* municipal corporation taking in all land within the district, unanimous consent not being required; all land may be included, though some owners object. Assessments are levied, bonds issued, and works built and managed by the publicly elected officers of the district. This system is rapidly spreading, there being statutes therefor now in thirteen States, and consti-

12 *Infra*, sec. 1342.

13 *Infra*, sec. 1266 et seq.

tutes an express recognition of the doctrine of public ownership of irrigation works.[14]

Public ownership has also received great impetus from two acts of Congress, viz., the Carey Act, and the Reclamation Act. The Federal conservation movement to-day is opposite—that title shall never leave the Federal government—but the above acts were passed some time ago, based upon the idea that title shall finally vest in the consumers themselves. Under the Carey Act (in force in about seven States, but chiefly in use in Idaho, Wyoming, Oregon and Utah), the United States has granted large areas of land to the State, and the State regulates the terms upon which companies shall develop them. The generally specified terms are that the consumers become owners of the land and also of the water-rights as appurtenances to the land, and shall completely take over the system, own, control and conduct it, when the lands thereunder are fully settled.[15] The same is provided by the Reclamation Act, whereby, after the major portion of lands under a given project have been fully paid for by the settlers, Congress shall, by appropriate action, convey the title to such reservoir, distributing system and water-right to a co-operative organization of consumers, and the United States shall drop out of the field.[16]

The rights of consumers in most Western States (other than California) being thus, under every form of organization, those of ownership, public regulation and control are based less upon the common law of public service than upon a new system of State administration, based upon State or public ownership in waters. A State Engineer and an administrative board are provided, and the entire State is divided into water divisions, and these subdivided into water districts for administrative purposes. The water officials take control of the works of companies, and independent individual water-right owners alike, measure out the water, shut or open headgates, and generally police the natural water resources of the State. In one State, at least, the State Engineer seems to be given power to fix rates[17] (though usually rate-fixing is left, as in California, to the county boards of supervisors).[17a] This administrative system is independent of any law of public service; it is based upon public or State ownership of waters,

[14] *Infra*, sec. 1356 et seq.
[15] *Infra*, sec. 1380 et seq.
[16] *Infra*, sec. 1394 et seq.
[17] S. D. Stats. 1907, c. 180, sec. 36.
[17a] *Infra*, c. 55.

whether in public service or not, whereby the State Engineer has control over all natural water resources in the State.[18]

(3d ed.)

§ 1249. **Public Control Without Public Ownership.**—Returning now to the California law, the question chiefly involved, as already considered, was not of the relative status of consumer and distributor, but of the right of the distributor to regulate the terms of its service by contract without interference. Though strongly upholding the public service rules of compulsory service and against forfeitures, yet the weight of California authority in other respects has been that the same law governed as in contract between private parties, as to conditions of service, creation of liens, and rates and charges. This tendency to apply the general law of private contract affected also the question of the relative status of consumer and company, and through that a proprietary right in the consumer, as part owner of the distributing system, showed itself in the California law somewhat similarly to the Colorado law.

This tendency to regard the consumer as an "appropriator," or part owner of the water-rights of the distributing system—as having a title in the real estate of the distributing system, and not merely a right of service—was for the most part tacitly assumed in the decisions. His right was declared "appurtenant to the land" and considered as though an interest in real estate;[19] and, citing a Colorado case, the consumer was held to have actual ownership of a water-right as real property for which he could bring an action to quiet title against the distributor,[20] saying that by contract with the distributor "an undivided interest, equal to the grantee's proportionate share of the water, was conveyed." So, also, it was provided by statute that whenever a corporation furnishes water to irrigate land, "the right to the *flow and use* of said water is and shall remain a perpetual *easement* to the land."[21] Again, in Stanislaus W. Co. v. Bachman,[22] the same doctrine was laid down, holding that the contract gives the consumer an interest in the irrigation company's canal and water-rights as real prop-

[18] *Supra*, Part VI.

[19] E. g., Fresno Canal Co. v. Dunbar, 80 Cal. 535, 22 Pac. 275.

[20] Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024.

[21] Civ. Code, sec. 552. See, also, Stats. 1897, p. 49, inserting sec. 11½ into Stats. 1885, p. 95.

[22] 152 Cal. 716, 93 Pac. 858, 15 L. R. A., N. S., 359.

erty. The result was a strong trend toward the Colorado basis of public ownership, recognizing in the consumers proprietary rights as part owners of the distributing system, with the logical end that when the number of consumers reached full capacity, they would, as a body, be the whole owners thereof.

Now, however, the cases of Leavitt v. Lassen Irr. Co.[23] and Lassen Irr. Co. v. Long[24] have considerably revised the previous California law, both as to the force of contract regulation by the company of its service and also as to actual ownership of interest in the distributing system by consumers.

The question in the Lassen cases arose out of what the consumer contended to be a "free water-right," under which he claimed the right, by contract, to receive water from the company's canal without charge and before any other consumers were supplied. Such a transaction, the Lassen cases held, would be illegal, because the distributor was a public service company. Plaintiff had relied partly upon the validity of contract, but the rule of public service is held to invalidate a contract for free service to one consumer in advance of others, as it would give him a preference right over other consumers—that is, would be discriminatory. He had also relied upon the Stanislaus case, arguing that the contract gave him a paid-up freehold interest in realty. This claim also was held untenable in that, it was held, it would create an exclusive private estate in property irrevocably devoted to public use.[25] The Stanislaus case was limited to its facts, and was further said to have overlooked the law of public service, and consequently little authority in public service cases.[1] The Park case, while not overruled, is subordinated to the Crow case, which considerably restricted the force of contract conditions of service. As to the statutes it was said that, so far as they might bear to the contrary, they are unconstitutional, because of the constitutional provision declaring the use to be a public one.[2]

It would seem that, if the principles of the Lassen cases are adhered to, the essential terms of service will be subject to control by the legislature, or, in the absence of legislative action, to the

[23] (1909), 157 Cal. 82, 106 Pac. 404.

[24] (1909), 157 Cal. 94, 106 Pac. 409.

[25] It was said that it would "turn a public use into private property." This inartistic expression was taken from the brief of counsel.

[1] Aside from questions of public service, see also, *supra*, sec. 35 et seq. regarding the Stanislaus case.

[2] *Infra*, secs. 1315 et seq., 1324 et seq.

common-law powers of the courts to enforce, by injunction, *mandamus,* or other process, a reasonable service to all, and to disregard contracts which, in clear cases, may stand in the way. Contract regulation will remain binding where its terms (as a question of fact in each case) are not unreasonable to the consumer, are not discriminatory, nor in violation of the duty of the company to serve, without unreasonable demands, all who apply and tender a reasonable rate; but contracts will not be binding upon consumers if they violate those principles.[3]

Likewise, it will end the tendency to public ownership toward which the recognition of proprietary estates in consumers had been leaning.[4] It places the California law upon the usual doctrine of public service agencies, resting in public control, sovereignty or regulative power (as opposed to public ownership, resting upon a right of the consuming public as proprietors of the works).

(3d ed.)

§ 1250. **Conclusion.**—There are thus three doctrines obtaining in the West with regard to the relative status, rights and duties of distributors and consumers of water for irrigation; viz., contract regulation, public regulation, public ownership. With regard to their relative merits, experience has shown the benefit of a free hand to regulate service by contract in building up new systems and pioneering. Under that system, applied not only to waters but to everything else, the West (and the whole country) has had its marvelous development, which could not have been otherwise attained or even approached. The attention which has been aroused over the matter to-day, however, has ushered in an era of official activity, finding expression sometimes in public control and sometimes in public ownership. With regard to the relative merits of the latter, the country is now at issue generally, and the tendency in new Western irrigation development is toward public ownership. In jurisdictions where the law is adhering to the more conservative ground of public regulation without consumers' ownership, a State executive system in the nature of a public service commission is being created.[5]

[3] *Infra,* sec. 1317.

[4] The Lassen cases considered the creation of a proprietary estate in the consumer illegal as withdrawing the property from public service and turning it into private ownership. It would create ownership in the consumer, it is true. But, as we have endeavored to show, if safeguarded against discrimination, the result is rather public ownership than private ownership.

[5] In 1911 such commissions were created in Nevada, Oregon and Wash-

These are the matters considered in detail in the following chapters, without reference to any views of the author's, but as a study of the law as it is.

ington and a constitutional amendment to the same end was proposed in California (not yet ratified). There is no administrative system headed by a State Engineer in California such as now exists in most other Western States based upon public ownership of waters, and attempts to create that system in California have been uniformly unsuccessful, except that in 1911 such a system was created to control water-power development. In 1911 Kansas also provided a public Service Commission, and Nebraska gave the State Railway Commission jurisdiction over irrigation rates. See State statutes *infra*, Part VIII.

§§ *1251–1259. (Blank numbers.)*

CHAPTER 53.

NATURE OF PUBLIC SERVICE.

A. PUBLIC SERVICE.

§ 1260. Property devoted to the service of the public.
§ 1261. What constitutes public service?
§ 1262. Theory of the law of public service—Sovereignty and not proprietorship—Public control as distinguished from public ownership.
§ 1263. The common law.
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B. PRIVATE SERVICE.

§ 1266. Mutual companies—Business not subject to public control.
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C. CHANGE OF CHARACTER OF SERVICE.

§ 1270. Change from private to public service.
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§§ 1273–1278. (Blank numbers.)

A. PUBLIC SERVICE.

(3d ed.)

§ 1260. Property Devoted to the Service of the Public.—Where water (or electricity generated from water) is distributed to the general public or a class thereof, the person so distributing it is said to have devoted his property to public use, and to be engaged in public service, and to be a *quasi* public servant.

Where, however, the distribution is limited to a private object, or for the benefit of particular individuals or estates, the use is generally not a public one,[1] and the distributor is not engaged in public service. The chief illustration is the distinction, in another branch of the law, between "common carriers" and "private carriers."

Distributors in private service are not bound by the duties (nor subject to the public control) applicable to those in public service, and the following chapters apply only to those in public service.

[1] *Supra*, sec. 606, eminent domain.

(3d ed.)

§ 1261. What Constitutes Public Service.—Where all owners of land within the service capacity of the canal will possess the right as members of the public to use the water which may be diverted into such canal, the use is clearly public,[2] and the company is therefore a public agency,[3] even if every member of the public in the neighborhood owns stock in the company, so long as the right of service is not dependent upon ownership of the stock.[4]

On the other hand, where several separate owners of water-rights by appropriation, or as riparian owners, or by prescription, in the waters of a certain creek, form a corporation for the purpose of distributing the water to themselves alone, the use is not thereby rendered a public one so as to give an outstanding owner a right to share in the distribution.[5] The use to which the water is appropriated is not necessarily a public use because of the fact that all of the beneficiaries, though numerous, form a company to distribute water to themselves alone, and have become stockholders of the company. The corporation may be (a question of fact) a mere agency of the parties entitled to the use of the water, and the service therefore private only,[6] as in the case of mutual companies.[7] Where all the beneficiaries are stockholders of the company, it depends upon whether their water-rights rest upon that fact, or whether the company would owe them duties without their holding stock, and it would owe them such duties if it engaged in a course of business with the public generally.[8]

What is a public use is an indefinite question.[9] It is a question of fact, depending partly upon the purpose of the distributor in the beginning, but chiefly upon the course of business adopted by the distributor at the time the question arises. In cases of doubt the test is whether, upon the facts presented, it appears that the distributor deals with the public and looks to the public for its business, or whether it supplies water only to particular indi-

2 Fallbrook Irr. Dist. v. Bradley, 164 U. S. 163, 17 Sup. Ct. Rep. 56, 41 L. Ed. 390. See. also, Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. Rep. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171.

3 *Ibid.*, and Gutierres v. Albuquerque etc. Co., 188 U. S. 545, 23 Sup. Ct. Rep. 338, 47 L. Ed. 588.

4 Lindsay Irr. Co. v. Mehrtens, 97 Cal. 676, 32 Pac. 802. Compare Baker etc. Co. v. Baker City (Or.), 113 Pac. 9.

5 Hildreth v. Montecito Co., 139 Cal. 23, 72 Pac. 295.

6 Shorb v. Beaudry, 56 Cal. 446.

7 *Infra*, sec. 1266.

8 Wheeler v. Northern Irr. Co., 10 Colo. 582, 3 Am. St. Rep. 603, 17 Pac. 487; Combs v. Ditch Co., 17 Colo. 146, 31 Am. St. Rep. 275, 28 Pac. 966.

9 Tuolumne etc. Co. v. Frederick, 13 Cal. App. 498, 110 Pac. 134.

viduals or estates. "The supplying of water to a tract of agricultural land, though of many thousand acres in extent, if occupied by an individual proprietor, would be for his private benefit, and not a public use, yet the same tract of land might be so subdivided and held in individual proprietorship as to render the supply of water to it a public instead of a private use. . . . . It is not necessary that the entire public shall enjoy the use, or even that it be capable thereof, but the use must be capable of enjoyment by all who may be within the neighborhood, and there must be within that neighborhood so great a number of the entire public as to destroy its character as a private use."[10]

A leading case in California defining the distinction between public and private service of water is Hildreth v. Montecito W. Co.,[11] wherein Mr. Justice Shaw said: "In the case of a public use, the beneficiaries do not possess rights to the waters which are, in the ordinary sense, private property. A public use 'must be for the general public, or some portion of it, and not a use by or for particular individuals, or for the benefit of certain estates.'[12] The use and benefit must be in common, not to particular individuals or estates.[13] The right of an individual to a public use of water is in the nature of a public right possessed by reason of his status as a person of the class for whose benefit the water is appropriated or dedicated. All who enter the class may demand the use of the water, regardless of whether they have previously enjoyed it or not."

If service is offered to the public generally, the kind of industry is immaterial; that is, distribution of water to the public for manufacturing purposes is public service as well as irrigation.[14] Likewise distribution of electric power.[15]

The matter is further considered in the chapter upon eminent domain,[16] with special reference to the decision of the supreme court of the United States in Clark v. Nash, where it was held

[10] Lindsay Irr. Co. v. Mehrtens, 97 Cal. 676, 32 Pac. 802.

[11] 139 Cal. 22, 72 Pac. 395, quoted and affirmed in Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 406.

[12] Citing McQuillen v. Hatton, 42 Ohio St. 202.

[13] Citing Lewis on Eminent Domain, sec. 161; Coster v. Tide Water Co., 18 N. J. Eq. 68; Pocantico Co. v. Bird, 130 N. Y. 259, 29 N. E. 246; Gilmer v. Lime Point, 18 Cal. 251; McFadden v. County of Los Angeles, 74 Cal. 571, 16 Pac. 397.

[14] State ex rel. Ferguson v. Birmingham W. Co. (1910), 164 Ala. 586, 51 South. 354.

[15] Northern etc. Co. v. Stacher. 13 Cal. App. 404, 109 Pac. 896. See *supra*, sec. 606, note 22.

[16] *Supra*, sec. 606 et seq.

that irrigation of a private estate might, in peculiar cases, be a public use, and the private irrigator might in such case be forced, perhaps, to share his water with the public, on demand.

(3d ed.)

§ 1262. **Theory of the Law of Public Service—Sovereignty and not Proprietorship; or Public Control as Distinguished from Public Ownership.**—Where the distributor engages in a public calling, it of necessity has a monopoly, and is in a position (however well intentioned) to take the public at a disadvantage. The law, consequently, declares that by entering public service and looking to the public for its customers and business the distributor thereby becomes a *quasi* public servant, and is bound by law to certain duties and restrictions.[17]

[17] *Arizona.*—Slosser v. Salt River Co., 7 Ariz. 376, 65 Pac. 332; Gould v. Maricopa Canal Co., 8 Ariz. 429, 76 Pac. 598. See, also, Maricopa Canal Co. v. Gould, 195 U. S. 639, 25 Sup. Ct. Rep. 792, 49 L. Ed. 356.

California.—Const., art. 14, sec. 1; Stats. 1885, p. 95; Civ. Code, sec. 552; Crow v. Irr. Co., 130 Cal. 309, 62 Pac. 562, 1058; People v. Stephens, 62 Cal. 209; Hildreth v. Montecito Water Co., 139 Cal. 22, 72 Pac. 395; Merrill v. Southside Irr. Co., 112 Cal. 426, 44 Pac. 720; Price v. Riverside Land & Irr. Co., 56 Cal. 431, 433; Cozzens v. N. Fork Ditch Co., 2 Cal. App. 404, 84 Pac. 342; Lanning v. Osborne (Cal.), 76 Fed. 319; Atlantic Trust Co. v. Woodbridge Canal & Irr. Co. (Cal.), 79 Fed. 39; San Joaquin & K. R. Canal & Irr. Co. v. Stanislaus County (Cal.), 90 Fed. 516; McCrary v. Beaudry, 67 Cal. 120, 7 Pac. 264; Spring Valley W. W. v. Schottler, 110 U. S. 347, 4 Sup. Ct. Rep. 48, 28 L. Ed. 173; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404; Lowe v. Yolo etc. Co. (1910), 157 Cal. 503, 108 Pac. 297.

Colorado.—Wheeler v. Northern Irr. Co., 10 Colo. 582, 3 Am. St. Rep. 603, 17 Pac. 487; Wyatt v. Larimer & Weld Irr. Co., 18 Colo. 298, 308, 36 Am. St. Rep. 280, 33 Pac. 144, reversing 1 Colo. App. 480, 29 Pac. 906; Junction Irr. D. Co. v. City of Durango, 21 Colo. 194, 196, 40 Pac. 356; Farmers' Independent D. Co. v. Agricultural D. Co., 22 Colo. 513, 521, 55 Am. St. Rep. 149, 45 Pac. 444.

Idaho.—Const., art. 15, secs. 1, 2, et seq.; Wilterding v. Green, 4 Idaho, 773, 45 Pac. 134; Hard v. Boise etc. Co., 9 Idaho, 589, 76 Pac. 331, 65 L. R. A. 407; Bardsley v. Boise etc. Co., 8 Idaho, 155, 67 Pac. 428; Boise etc. Co. v. Boise City (Idaho), 123 Fed. 232, 59 C. C. A. 236; Hatch v. Consumers' etc. Co. (1909), 17 Idaho, 204, 104 Pac. 670; Green v. Byers, 16 Idaho, 178, 101 Pac. 79.

Kansas.—Western Irr. Co. v. Chapman, 8 Kan. App. 778, 59 Pac. 1098.

Montana.—Const., art. 3, sec. 15, (See State ex rel. Crawford v. Minnesota etc. Co., 20 Mont. 198, 50 Pac. 420.)

Nebraska.—Farmers' Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. 286; Sammons v. Kearney Power & Irr. Co., 77 Neb. 580, 110 N. W. 308, 8 L. R. A., N. S., 404; Farmers' etc. Co. v. Brumbaugh, 81 Neb. 641, 116 N. W. 514.

New Mexico.—Albuquerque Land & Irr. Co. v. Gutierrez, 10 N. M. 177, 61 Pac. 357; Candelaria v. Vallejos (N. M.), 81 Pac. 589.

North Dakota.—Stats. 1905, c. 34, sec. 19; Stats. 1905, p. 274, sec. 925.

Oregon.—B. & C. Ann. Codes, tit. 11, sec. 4993.

South Dakota.—Stats. 1905, p. 201, secs. 19, 35.

Texas.—Colorado Canal Co. v. McFarland and Southwell (Tex. Civ.

The public right to enforce the duties arises out of the sovereignty or "police power" of the State. The leading case upon the theory of public service companies is Munn v. Illinois,[18] saying: "From this source come the police powers, which, as was said by Chief Justice Taney in the License Cases,[19] 'are nothing more or less than the powers of government inherent in every sovereignty—that is to say, the power of governing men and things.' Under these powers the government regulates the conduct of its citizens, one toward another, and the manner in which each shall use his own property when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc.; and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished and the articles sold." (Adding that to-day the States pass statutes upon these subjects under the police power.[20])

Correspondingly, as the public right rests upon the sovereign power of the State to protect the citizen against misuse of monopoly, it does not involve consideration of the company's tenure of its property. It is not a branch of the law of real property. The company may hold its titles in fee simple, by lease, or by mere license, or subject to mortgage, easements or liens; however it be is immaterial to the law, which looks to the business it conducts, irrespective of its title to property. Though regulation belongs to the State, the property itself belongs to the company as to any other owner of property. In no true sense does the public right

App.), 94 S. W. 400; Same v. Same, 50 Tex. Civ. App. 92, 109 S. W. 435.

Washington.—Prescott Irr. Co. v. Flathers, 20 Wash. 454, 55 Pac. 635; State ex rel. Shropshire v. Superior Court, 51 Wash. 386, 99 Pac. 3; Pierce's Code, sec. 5870; Const., art. 21, sec. 1.

Wyoming.—Stats. 1907, p. 138, sec. 12.

United States.—Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; Lanning v. Osborne (Cal.), 76 Fed. 319; Atlantic Trust Co. v. Woodbridge Canal & Irr. Co. (Cal.), 79 Fed. 39; San Joaquin etc. Irr. Co. v. Stanislaus County (Cal.), 90 Fed. 516; Spring Valley W. W. v. Schottler, 110 U. S. 347, 4 Sup. Ct. Rep. 48, 28 L. Ed. 173.

[18] 94 U. S. 113, 24 L. Ed. 77.

[19] 5 How. 583, 12 L. Ed. 279.

[20] "He, in effect, grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public for the common good, as long as he maintains the use. When private property is devoted to public use, it is subject to public regulation. If the right to regulate exists," the right to establish the reasonable compensation for services as one of the means of regulation is implied. Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77. See, also, 30 Am. & Eng. Ency. of Law, 476.

rest upon public ownership of the distributing system, either directly or through any technical trust. When it is said that the agency is a trustee of its property for the public, the word "trust" is used in a colloquial and inartistic sense, for the duties of the so-called trust can seldom be enforced by a bill in equity, as is the necessary procedure in true trusts; they are enforced by *mandamus*, which in itself shows that equity jurisprudence is not involved. Likewise, the matter differs from the technical dedication existing in cases of highways and parks, which dedication operates upon the title to the property, passing an easement to the public [21] and sometimes passes the fee in the soil [22]—a kind of a conveyance carving out an easement from the title and passing it to the public to the extent of the easement. The public rights become those of actual public ownership in the park. But a railroad company, for example, does not, by merely engaging in the business, pass a public easement in its right of way, nor transfer to the public any share in its property rights in its rolling stock, stations, or other property by any technical dedication such as the public has in a dedicated street or park. No such dedication can be imputed to the owner of a wharf, for example. The supposed grant or dedication of ownership to the public is a pure fiction, which, far from aiding, merely confuses the understanding of the problem.[23] The public right to impose the duties of public service is one of control, sovereignty or regulative power, and not one of ownership or property.[24]

21 19 Am. & Eng. Ency. of Law, 22.

22 *Ibid.*, 74.

23 Freund's Police Power, sec. 372.

24 There may, indeed, be at common law an actual dedication of water-rights to the public which will pass title the same as in the dedication of a public park; such as where the owner throws open a spring, for example, to the public and abandons all control over it and makes no attempt to charge for its use—an outright gift to the public. Thus a case is mentioned by Lord Coke of a watering place in the inhabitants of Southwarke, for which an action was held to lie. Coke's Littleton, 56a. See, also, McConnell v. Lexington, 12 Wheat. 582, 6 L. Ed. 735; Hough v. Porter (1909), 51 Or. 318, 98 Pac. 1083. So, where one plats a townsite and represents water mains upon it, he may (perhaps) be held to have dedicated his water supply to purchasers. See Village of Hailey v. Riley, 14 Idaho, 481, 95 Pac. 686, 17 L. R. A., N. S., 86. See, also, *supra*, sec. 60. But such cases of actual public ownership are unusual at common law and much different from the principle upon which the common law of public service agencies rests. For the general distinction between the rights of a government as sovereign and as proprietor, see Moore v. Smaw, 17 Cal. 199, 79 Am. Dec. 123, 12 Morr. Min. Rep. 418, per Field, C. J., a leading case, though not specifically involving the present matter.

Nor does the matter depend upon contract. "These things are not of the contract; they appertain to the sovereignty of the State, and cannot be bargained away."[25]

Consequently, for example, if a governmental body distributes water (such as a city under municipal ownership, or the United States under the Reclamation Service), it does so in its proprietary capacity only—it becomes, like other proprietors of distributing works, subject to the sovereign regulation of the State (at least, in theory); and its rates and conduct are subject thereto.[1] Of course, in practice the United States will control.

(3d ed.)

§ **1263. The Common Law.**—At common law, the business of the company is considered to be affected with a public interest, thereby subjecting the business, the conduct of the company toward consumers, to restrictions in favor of the public. The rule

[25] Spring Valley W. W. v. San Francisco, 61 Cal. 18. Accord, Spring Valley W. W. v. Schottler, 110 U. S. 347, 4 Sup. Ct. Rep. 48, 26 L. Ed. 173.

[1] *Municipal Ownership.*—So, Pasadena v. Pasadena L. & W. Co., 152 Cal. 593, 93 Pac. 490, holding that a city furnishing water to another city is subject to have its rates regulated in the latter city. (See, also, Or. Stats. 1911, c. 80, p. 121; Twitchell v. City of Spokane, 55 Wash. 86, 133 Am. St. Rep. 1021, 104 Pac. 150, 24 L. R. A., N. S., 290; but see People v. Stephens, 62 Cal., at 237). A city may establish a municipally owned water system although it has granted a franchise to a company. Mitchell v. Tulsa etc. Co., 21 Okl. 243, 95 Pac. 961; Madera W. Co. v. City of Madera (1910), 185 Fed. 281.

Federal Ownership.—The acts of Congress usually expressly declare that the States shall regulate rates of distributing companies other than the United States. *Supra*, sec. 176. But aside from that, even as to the United States Reclamation Service it has been said that "where, by a contract between the United States and landowners tributary to a Federal irrigation system, such land owners agreed to pay to the United States the charges duly levied against their lands for the construction and maintenance of the system, they were only liable for such *reasonable* charges as the government was authorized to collect, proportionate to their share of the cost of maintaining and operating the system, and not such as might be arbitrarily fixed in advance by such secretary or other governmental officer." Headnote in Federal Reporter to United States v. Cantrell (Or.), 176 Fed. 949. Compare the following: "And if an express stipulation had been inserted in the agreement granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative, because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a State or elsewhere, except in the cases in which it is expressly granted." Pollard v. Hagan, 3 How. (U. S.) 212, 11 L. Ed. 565. Cf. Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. Rep. 655, 51 L. Ed. 956. But see 37 Land Dec. 6, saying: "Reclamation works of the United States, whether constructed or purchased, are agencies of the general government, independent of obligation or control of State authority, and though purchased by the general government from public utility owners subject to State law, after such purchase they are not held by the United States as legal successor of the owner, but as its own public works, subject only to such obligation and control as is authorized by Congress."

of the common law, which the courts will enforce in the absence of statute, is "A reasonable service to all upon tender of a reasonable rate," or, as it is put in the cases, "Prompt, equitable, and gracious distribution";[2] or "Though this be private property, yet the principle laid down by Lord Hale attaches upon it, that when private property is affected with a public interest it ceases to be *juris privati* only; and in case of its dedication to such a purpose as this, the owners cannot take arbitrary and excessive duties, but the duties must be reasonable."[3] The distributor "must serve all with equal facilities and without discrimination."[4] It stands "simply as the agent of the public in the execution of this use,"[5] and "it enjoys and must exercise its opportunities for gain subject to its obligation to the public, that it will supply water without unjust discrimination and at uniform rates to all those along the lines of its mains who apply and tender a reasonable compensation."[6] The company is, at common law, bound to furnish a reasonable service to all upon tender of a reasonable rate; more particularly, is limited against transactions that would interfere with the performance of the public duties of serving all the public to the extent of its capacity, and with adequate facilities and upon tender of a reasonable rate (as fixed by some public body if such action has been taken), and without discrimination, and similar restrictions upon conduct imposed by law (acting through the courts, in absence of legislation) because of its sovereign authority in a matter directly operating upon the public.

The following expresses these principles of common law as applied to irrigation companies: "The carrier voluntarily engages in the enterprise. It has in most instances, from the nature of things, a monopoly of the business along the line of its canal. Its vocation, together with the use of its property, are closely allied to the public interest. Its conduct in connection therewith materially affects the community at large. It is, I think, charged with what the decisions term 'a public duty or trust.' *In the absence of legislation on the subject,* it would, for these reasons, *be held at common law,* to have submitted itself to a reasonable

2 Spring Valley Co. v. San Francisco, 165 Fed. 713.

3 Allnutt v. Inglis, 12 East, 527, 537, 104 Eng. Reprint, 206.

4 State ex rel. Ferguson v. Birmingham W. Co. (1910), 164 Ala. 586, 51 South. 354.

5 Leavitt v. Lassen Irr. Co. (1909), 157 Cal. 82, 106 Pac. 404.

6 State ex rel. Shropshire v. Superior Court (1909), 51 Wash. 386, 99 Pac. 3. See, also, the duties specified in Cal. Civ. Code, sec. 551.

judicial control, invoked and exercised for the common good, in the matter of regulations and charges; and an attempt to use its monopoly for the purpose of coercing compliance with unreasonable and extortionate demands would lay the foundation for judicial interference."[7]

(3d ed.)

§ 1264. **Constitutional Declaration.**—It is usual to find, in the West, constitutional provisions to the effect that the distribution of water for irrigation or other purposes is a public use, somewhat similar to that in the California constitution of 1879. The first clause of article 14, section 1, of the California constitution is as follows: "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law."[8] The rest of the section applies exclusively to cases where water is supplied to incorporated cities or towns.[9]

Such a declaration is merely declaratory of the common law. Article 14 of the California constitution is merely declaratory of

[7] Wheeler v. Northern Irr. Co., 10 Colo. 582, 3 Am. St. Rep. 603, 17 Pac. 487, citing Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; Price v. Land etc. Co., 56 Cal. 431; Chicago etc. Ry. Co. v. People ex rel. Hempstead, 56 Ill. 365, 8 Am. Rep. 690; Vincent v. Chicago Ry. Co., 49 Ill. 33. See, also, Leavitt v. Lassen Irr. Co., 157 Cal. 586, 106 Pac. 404; 22 Am. & Eng. Ency. of Law, 930; 30 *Ibid.* 416; Freund's Police Power, sec. 372 et seq. In McCrary v. Beaudry, 67 Cal. 120, 7 Pac. 264, it is said in general terms: "Water appropriated for distribution and sale is *ipso facto* devoted to a public use, which is inconsistent with the right of the person so appropriating it to exercise the same control over it that he might have exercised if he had never so appropriated it."

[8] Similar provisions, usually based upon this, are the following:

Colorado.—Const., art. 16, sec. 8; Rev. Stats. 1908, secs. 3254, 3262 et seq.; Rev. Stats., sec. 3271 et seq.

Idaho.—Const., art. 1, sec. 14; art. 15, sec. 1 et seq.

Montana.—Const., art. 3, sec. 15; Civ. Code, sec. 1897 et seq.

Nebraska.—Comp. Stats. 1903, secs. 6456, 6473; Cobbey's Ann. Stats., sec. 6800 et seq.

Nevada.—Comp. Laws 1900, sec. 354.

North Dakota.—Stats. 1905, c. 34, secs. 3, 19.

Oklahoma.—Stats. 1905, p. 274, c. 21, sec. 2.

Oregon.—B. & C. Codes, tit. 11, sec. 4993; Lord's Oregon Laws, sec. 6525.

Utah.—Stats. 1905, c. 108, sec. 50.

Washington.—Const., art. 21, sec. 1. See, also, Pierce's Code (1905), secs. 5122, 5870.

Wyoming.—Const., art. 1, sec. 13; Laws 1907, c. 86, p. 138, sec. 12.

Additional references are given in Part VIII, below. See, also, provisions following the Colorado Const., *supra*, sec. 170, declaring waters the "Property of the Public" or "of the State."

[9] As to which see, also, Cal. Civ. Code, sec. 551. The California Constitution of 1879 contains much to the same effect regarding railways. See *supra*, sec. 123.

the restrictive principle of common law concerning the conduct of the business in question, and the innovation (which was a great one) consisted in putting this principle in the constitution itself where it would be beyond the control of the legislature, which, it is well known, the California constitutional convention distrusted. Thus, in People v. Stephens,[10] it is said that this constitutional provision meant to "lay a stronger hand upon them than that of the legislature." And in Merrill v. South Side Irr. Co.,[11] "The evident intent of the framers of our constitution was to strike a blow at the monopolies which had grown up out of the sale, rental and distribution of water, and by declaring such use a public use to bring it within the control," etc. And Fresno etc. Co. v. Park[12] goes at length into the same history; that the constitution meant to lay a strong hand upon these monopolies, which the legislature consequently was rendered powerless to favor, and further holds that the constitution is solely restrictive and grants nothing; saying in effect that the word "franchise" in section 2 of this article is surplusage, and that there is no grant of any privilege by the constitution, which is solely restrictive.

The law of public service companies and of the power of State control, being the principle of the common law, applies to companies organized and existing before the constitution was adopted, as well as those organized later. Says the supreme court of the United States: "It matters not in this case that these plaintiffs in error had built their warehouses and established their business before the regulations [constitution of Illinois] complained of were adopted. What they did was *from the beginning* subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good."[13] A company in California formed and distributing water for irrigation before the constitutional provision was adopted was dealt with in Price v. Riverside W. Co.,[14] where it is expressly said: "Every corporation deriving its being from the act above cited has impressed upon it a public trust—the duty of furnishing water, if water it has, to all those who come within the class or community for whose alleged benefit it has been created. . . . . *The duty exists without any express statutory words imposing it, wherever the public use appears.*" This case is re-

10 62 Cal. 209.
11 112 Cal. 426, at 433, 44 Pac. 720.
12 129 Cal. 442, 62 Pac. 87.
13 Munn v. Illinois, 94 U. S. 113, at 133, 24 L. Ed. 77. (Italics ours.)
14 56 Cal. 433.

ferred to in Leavitt v. Lassen Irr. Co.[15] as laying down the law "even before the adoption of the constitution of 1879," and Judge Henshaw in the Lassen case further quotes with approval an Indiana case declaring that the principle receives universal recognition, and saying: "*No statute has been deemed necessary* to aid the courts in holding that, when a person or company undertakes to supply a demand which is affected by a public interest, it must supply all alike who are like situated, and not discriminate in favor of nor against any." So, it has been actually held in California that article 14, section 1, applies to water companies formed before 1879, as well as after; since it added nothing new in declaring the use a public one and subject to State control.[16]

The business is a private enterprise, but one affected with a public interest, which the constitution, merely affirming the common law, declares shall subject it to public regulation and control.

(3d ed.)

§ 1265. **Same.**—While not intending here to do more than set forth the foregoing general principle, it is a convenient place to give some other decisions under this section.

[15] 157 Cal. 82, 106 Pac. 404.

[16] Spring Valley W. W. v. San Francisco, 61 Cal. 4, at pages 8 and 9. Accord, Spring Valley W. W. v. Schottler, 110 U. S. 347, 4 Sup. Ct. Rep. 48, 28 L. Ed. 173. It is true that there have lately been intimations to the contrary. See Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. 858, 15 L. R. A., N. S., 359; South Pasadena v. Pasadena L. & W. Co., 152 Cal. 579, 93 Pac. 490; Boise etc. Co. v. Turner (Idaho), 176 Fed. 373. For example, doubt was expressed in Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. 858, 15 L. R. A., N. S., 359, whether water companies formed and serving the public before 1879, the date of the adoption in California of the constitutional provision, could be held to the duties of public service, suggesting that it would amount to taking property for public use without compensation. There can, however, be no question of a taking, since the property is voluntarily devoted to public use when the calling is entered into. No "taking" is required. Moreover, the argument involves a suggestion that there was no law of public service at common law before the constitutional provision was adopted. But the decision in Munn v. Illinois had been rendered in 1876, before the constitutional declaration, and in that case the principle was said to have been the common law from early times. The Stanislaus case is laid aside by the court in general terms, so far as it dealt with public service, in Leavitt v. Lassen Irr. Co. (1909), 157 Cal. 82, 106 Pac. 404.

See, generally, Price v. Riverside Co., 56 Cal. 433; Spring Valley W. W. v. San Francisco, 61 Cal. 4; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404; Lowe v. Yolo etc. Co., 8 Cal. App. 167, 96 Pac. 379, affd. in (1910) 157 Cal. 503, 108 Pac. 297; Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 97; Wheeler v. Irr. Co., 10 Colo. 582, 3 Am. St. Rep. 603, 17 Pac. 487; Lanning v. Osborne, 76 Fed. 319; San Diego Co. v. City of National City, 74 Fed. 81; Spring Valley W. W. v. Schottler, 110 U. S. 346, 4 Sup. Ct. Rep. 48, 28 L. Ed. 173.

Concerning the declaration that the use is a public use, it has been said that it "merely declares that the use of water appropriated for distribution, etc., is a public use, and that the State may by law regulate it." [17]

Concerning the use of the word "franchise" in another clause, it is said in the same case: " . . . . but the word was evidently employed in section 2 mainly for the purpose of emphasizing the general declaration in section 1 that the use of water for sale, distribution, etc., is a public use, and with the notion, no doubt, that calling it a franchise would make more clear and certain the intent to subject it to state regulation. In all other respects the meaning and effectiveness of section 2 would be the same if the words 'is a franchise and' were not there." This expression, however, was disregarded in San Joaquin etc. Co. v. Merced County,[18] where it was held that the constitution in some way went beyond the common law, and did confer a franchise of some kind, which was held taxable. The decision is inconsistent with the reasoning of the Park case.[19]

Concerning the use of the word "appropriated" in this section, the California court has held that it means any setting apart or devotion of the waters to the purpose of sale, rental or distribution, and not merely a public land appropriation under the law of appropriation.[20] It has been held that the place of the "appropriation," mentioned in the part of the section quoted, is the place where the water is used, and not necessarily the place where the source of supply, the pumping plant and waterworks, or the diverting dam, may be situated.[21]

The article in question provides for public regulation of rates, pursuant to which statutes have been passed.[22] In case of refusal to supply water in cities or towns in accordance with the section, forfeiture of franchise and waterworks is provided; but the constitutionality of such provision has been questioned.[23]

[17] Fresno etc. Co. v. Park, 129 Cal. 441, 62 Pac. 87.

[18] 2 Cal. App. 593, 84 Pac. 285.

[19] See, in this connection, Idaho Fruit etc. Co. v. Great Western etc. Co. (1909), 17 Idaho, 273, 105 Pac. 562; Boise City v. Artes etc. Co. (1895), 4 Idaho, 351, 39 Pac. 562.

[20] Hildreth v. Montecito etc. Co., 139 Cal. 23, 72 Pac. 395; Mahoney v. American L. & W. Co., 2 Cal. App. 185, 83 Pac. 267; Merill v. Southside Irr. Co., 112 Cal. 426, 44 Pac. 720.

[21] Fellows v. Los Angeles, 151 Cal. 52, 90 Pac. 137.

[22] See *infra*, sec. 1299 et seq.

[23] Fresno Canal Co. v. Park, 120 Cal. 441, 62 Pac. 87, and Spring Valley W. W. v. Schottler, 110 U. S. 347, 4 Sup. Ct. Rep. 48, 28 L. Ed. 173.

In California, a statute repeats the words of the constitutional declaration and places the power of regulation in the board of supervisors.[24] The duties of the distributor, however, as above pointed out, rest as much upon the common law and the constitution as upon statute.

The California constitution of 1879 was, we learn from Bryce's "American Commonwealth," a response to the demand of "Kearneyism," then at its height; and the constitution itself provided a specific method for water control in cities. With the influence of the movement still strong, the first legislature under the new constitution passed the statute of 1880 governing irrigation outside of cities. In 1885 a more detailed act was passed to the same end. By 1897, however, the tension of the movement had relaxed, and the act of 1885 was amended to return to the ways before the constitution, and permit fixing terms of service by private contract; while in 1901 an entire new statute was passed to the same effect. These statutes are printed in the part of this book devoted to statutes. The supreme court of California has recently said that statutes placing private contract above public control are unconstitutional, as below quoted.[25]

B. PRIVATE SERVICE.

(3d ed.)

§ 1266. Mutual Companies—Business not Subject to Public Control.—Before proceeding to the duties of public service companies, to whom alone the following chapters apply, something may be said of a special kind of private service companies called "mutual companies." Mutual companies are usually such that shares of stock represent rights to specific quantities of water, and the stockholder's right to a supply rests upon his stock and not upon his status as a member of the public, the company being

[24] Stats. 1885, p. 25. The act of 1885, in as far as it provides that the use of all water appropriated for sale, rental or distribution in this State should be a public use and subject to regulation and control, is valid. San Diego etc. Co. v. National City, 174 U. S. 739, 19 Sup. Ct. Rep. 804, 43 L. Ed. 1154; San Joaquin etc. Co. v. County of Stanislaus (1908), 155 Cal. 21, 99 Pac. 365. The first section of the act is: "The use of all water now appropriated or that may hereafter be appropriated for irrigation, sale, rental, or distribution, is a public use, and the right to collect rates or compensation for use of such water is a franchise, and except when so furnished to any city, city and county, or town, or the inhabitants thereof, shall be regulated and controlled in the counties of this State by the several boards of supervisors thereof, in the manner prescribed in this act." See, also, Cal. Civ. Code, sec. 552.

[25] *Infra*, secs. 1317, 1325.

formed to supply water to its stockholders only. Such companies occupy a very great and extensive part of the Western irrigation field. Their prevalence is due partly to the amalgamation, in course of time, of individual and partnership ditches; partly to the fact that the original construction of many large canals has been the work of stock companies organized by owners of the land under the proposed canals (in which each stockholder is entitled to the proportionate share of water carried by the ditch which his stock bears to the capital stock of the company); partly because it is often considered good management by the owners of a public service system, after having built lateral systems, to make over each lateral to the colonists thereunder (who are organized into a colony ditch company for the purpose, so that the maintenance of the lateral and the distribution of water therefrom rest entirely with the lateral ditch company, and in these lateral companies each acre represents one share of stock, and maintenance of laterals is assessed on an acreage basis); partly also because bankruptcy of old companies frequently forces consumers to take over the entire system upon a co-operative basis.

Most of the irrigation in Southern California is done under mutual organization, in which each irrigator owns stock. The amount of stock held varies from a fraction of a share per acre to several shares per acre. Somewhat similar organizations are found in large numbers in other parts of California, particularly San Joaquin Valley (although there public service companies predominate). Co-operative organizations of one form or another are largely in majority in Utah, and some of the most important irrigation systems of Colorado are under similar organization.

Because of this extensive prevalence of mutual companies in practice, it is very important to note that, being in private service only, they are not subject to the public control which obtains as to public service companies.[1] The board of supervisors or other public body has no power to fix the rates or charges of mutual companies.[2] Nor can a mutual company be forced to deliver water to others than its stockholders. "This company is not, strictly speaking, a public service corporation delivering water to a public use. It is engaged in procuring three hundred and fifty inches

[1] Authorities cited *supra*, sec. 1261.

[2] McFadden v. Board of Supervisors Co. of Los Angeles, 74 Cal. 571, 16 Pac. 397.

of water for its stockholders and delivering it only to stockholders in proportion to their respective amounts of stock, for use on their respective tracts of land."[3] A mutual company (if a corporation) must obey the laws of the State relating to the internal workings of corporations,[4] but otherwise its conduct toward its members is a purely private matter.

(3d ed.)

§ 1267. **Mutual Companies, Continued.**—In Colorado, as elsewhere set forth, the consumer from a company's ditch is held to be an appropriator from the natural stream through the intermediate agency of the ditch, with a result approaching public ownership. Where the water users are numerous there is little difference between mutual companies and general companies under this view. The consumer in Colorado has all the rights of an appropriator as though himself diverting the water from its natural source, and the canal company is only an agent to carry the water to him. This has been held true of mutual companies as of other kinds, so that a stockholder in a mutual company in Colorado may bring suit like other appropriators to change his point of diversion, without the consent of the company.[5] It is held in Colorado that a stockholder in a mutual ditch company may change his place of use so long as other stockholders are not injured, and a by-law to the contrary is invalid where not authorized by charter or expressly assented to by the stockholder.[6] A right represented by a certificate, it has been held, may be lost by nonuse, like appropriations from a natural stream.[7]

In California a recent case leaves open the question whether the stockholders in a mutual company are to be regarded as holding the water-rights, the company being only their agent, or whether the company holds the title.[8] *Quaere,* however, why the general rule of

[3] Barton v. Riverside Co. (1909), 155 Cal. 509, 101 Pac. 790, 23 L. R. A., N. S., 331. See, also, Arroyo D. Co. v. Baldwin (1909), 155 Cal. 280, 100 Pac. 874; Hildreth v. Montecito Co., 139 Cal. 22; Shorb v. Beaudry, 56 Cal. 446; McDermott v. Anaheim etc. Co., 124 Cal. 114, 56 Pac. 779.

[4] Miller v. Imperial etc. Co. (1909), 156 Cal. 27, 103 Pac. 227, 24 L. R. A., N. S., 372.

[5] Wadsworth D. Co. v. Brown, 39 Colo. 57, 88 Pac. 1060.

[6] Knowles v. Clear Cr. Co. (1893), 18 Colo. 209, 32 Pac. 279. See, also, Cache etc. Irr. Co. v. Larimer Res. etc. Co., 25 Colo. 144, 71 Am. St. Rep. 123, 53 Pac. 318; Wadsworth D. Co. v. Brown, 39 Colo. 57, 88 Pac. 1060.

[7] Strickler v. Colo. Springs, 16 Colo. 61, 25 Am. St. Rep. 245, 26 Pac. 313; Combs v. Ditch Co., 17 Colo. 146, 31 Am. St. Rep. 275, 28 Pac. 966.

[8] Arroyo D. Co. v. Baldwin (1909), 155 Cal. 280, 100 Pac. 874. See, also, Fuller v. Azusa etc. Co., 138 Cal. 204,

the law of corporations should not apply, to the effect that a share of stock is not an ownership of the corporate property.

A stockholder in a mutual company may enjoin an increase of stock and a proposal to supply more land, if in excess of the capacity of the water system.[9]

In California, a two-thirds vote of stockholders is required before a mutual company may divide up its water-rights among its stockholders, in some cases.[10]

An extensive statute has just been enacted in Oregon for the formation of co-operative irrigation or drainage corporations.[11]

(3d ed.)

§ 1268. **Stock in Mutual Companies.**—A mutual company may make reasonable by-laws, and the rights of stockholders are presumed equal in the absence of anything to the contrary in the certificates of stock, by-laws, articles of incorporation, or other writing.[12] In Wyoming, stock in mutual irrigation companies is made assessable by statute.[13]

A stockholder in a mutual company may secure the writ of *mandamus* to enforce the privileges appertaining to his stock. In a recent case the court speaks of "a member of a corporation who is improperly precluded by the corporation from participating in the only practical right resulting from such membership, that of having water available for the purpose furnished at cost upon his land, in proportion to the amount of stock held by him. He is seeking to enforce a plain right based entirely upon his membership in a *mutual* water company, deprivation of which right would practically exclude him for the time from all privileges of membership, in a case where, it must be held under the decisions, there is not a plain, speedy and adequate remedy, in the ordinary course

71 Pac. 98; Richey v. East Redlands Co., 141 Cal. 221, 74 Pac. 754. Cf. Lanham v. Wenatchie Co. (Wash.), 93 Pac. 522, holding that a right against a stockholder to take water is not a right against the corporation. See Ruhnke v. Aubert (Or.), 113 Pac. 38, holding that a stockholder in a mutual company has a right of ownership in the flow of the water and in the use of the company's ditch.

9 McDermott v. Anaheim Co., 124 Cal. 112, 56 Pac. 779.

10 Cal. Civ. Code, sec. 309. See, also, Civ. Code, sec. 361a and So. Pasadena v. Pasadena Co., 152 Cal. 593, 93 Pac. 490.

11 Or. Stats. 1911, c. 172, p. 256.

12 Rickey v. East Redlands Co., 141 Cal. 221, 74 Pac. 754; Rocky Ford etc. Co. v. Sampson, 5 Colo. App. 30, 36 Pac. 638; Cobbey's Ann. Stats., sec. 6820; Neb. Laws 1895, p. 268, sec. 66.

13 Wyo. Rev. Stats. 1899, sec. 976. See, however, Enterprise D. Co. v. Mofitt, 58 Neb. 642, 76 Am. St. Rep. 122, 79 N. W. 560, 45 L. R. A. 647, holding that the legislature could not make full paid ditch stock assessable.

of law. It is one of the well-recognized offices of the remedy by *mandamus* to enforce the plain rights of stockholders or members of corporations in the absence of any other adequate remedy, [etc.]; . . . . the stockholder's right to have water furnished on his land is not based on any special contract entered into by him with the corporation, but is an inseparable adjunct of his membership, and it is a plain duty resting on the corporation in the exercise of its corporate functions to furnish him such water." [14]

(3d ed.)

§ 1269. **Transfer of Stock in Mutual Companies.**—So long as the company remains purely a mutual one, the certificate of stock represents the water-right. A transfer or sale of the certificate is governed by much the same rules as those elsewhere considered regarding transfers of water-rights. Whether the water-right is appurtenant to the stockholder's land is a question of fact in each case, as is also whether on a sale of the land the water-right passes as appurtenance. A sale of the certificate may be made separate from the land for use on other land and will transfer the water-right,[15] where the change does not injure other existing water users by the new place of use [16] (who alone, however, can raise the objection that they are injured), the transfer being complete when (and not until) entered on the books of the company.[17] On the other hand, in the absence of any separate sale of the certificate or of any other evidence of any express intention to make a severance, a sale of the land on which the water is used will carry the water-right and right to the certificate as an appurtenance. Upon this general matter reference is made to a preceding chapter [18] and to some cases collected in the note.[19]

A recent statute in California provides that the by-laws may restrict the use of the water to the lands of stockholders, so that

[14] Miller v. Imperial W. Co (1909), 156 Cal. 27, 103 Pac. 227, 24 L. R. A., N. S., 372, holding that mandate lies.

[15] Oppenlander v. Left Hand D. Co., 18 Colo. 142, 31 Pac. 854; Oligarchy Co. v. Farm Inv. Co., 40 Colo. 291, 88 Pac. 443.

[16] Cache La Poudre etc. Co. v. Larimer etc. Co., 25 Colo. 144, 71 Am. St. Rep. 132, 53 Pac. 318; Grand Valley etc. Co. v. Lesher, 28 Colo. 273, 65 Pac. 44.

[17] Cache La Poudre Irr. Co. v. Larimer & Weld Irr. Co., 25 Colo. 144, 71 Am. St. Rep. 132, 53 Pac. 318; Spurgeon v. Santa Ana etc. Co., 120 Cal. 71, 52 Pac. 140, 39 L. R. A. 701; George v. Robinson, 23 Utah, 79, 63 Pac. 819.

[18] *Supra*, secs. 496 et seq., 550.

[19] The following cases are cited upon the general subject of rights in mutual companies: McFadden v. Board of Supervisors of Los Angeles, 74 Cal. 571, 16 Pac. 397; Eaton v. Larimer etc. Co., 35 Colo. 16, 83 Pac. 627; Biggs v. Utah etc. Co., 7 Ariz. 331, 64 Pac. 491; Oppenlander v. Left

the stock and right to use the water shall only be transferred with said lands, provided the by-law is recorded in the office of the county recorder.[20] Articles of incorporation may restrict use of water in a mutual company to land devoted exclusively to the use of each stockholder.[21]

C. CHANGE OF CHARACTER OF SERVICE.

(3d ed.)

§ 1270. Change from Private to Public.—The owner of a private irrigation system enters public service when he devotes the water to general sale, rental and distribution.[22] It is expressly so declared, for example, in the Idaho constitution.[23]

Likewise, mutual companies, to avoid the duties of public service companies, must continue within the limited course of business above described, and where they make a practice of looking to the general public for their business, they change their character and enter public calling, and then are bound by the duties of public service, one result of which is that they can then no longer insist upon ownership of stock before furnishing water.[1]

Where the owner of a private service system sells to a company formed for public service, it has been said that he may reserve from public use, and retain for his private use, such quantity of the water

Hand Ditch Co., 18 Colo. 142, 31 Pac. 954 (holding, upon specific facts, that title passed on sale of the stock, not on sale of the land); Estate of Thomas, 147 Cal. 236, 81 Pac. 539; True v. Rocky Ford etc. Co., 36 Colo. 43, 85 Pac. 842; Wells v. Price, 6 Idaho, 490, 56 Pac. 266; Struby etc. Co. v. Davis, 18 Colo. 93, 36 Am. St. Rep. 266, 31 Pac. 495; Snyder v. Murdock, 20 Utah, 419, 59 Pac. 91; Combs v. Agricultural Ditch Co., 17 Colo. 146, 31 Am. St. Rep. 275, 28 Pac. 966 (holding defendant not on the facts a mutual company, and shares of stock did not represent the water-right); Farmers' etc. Co. v. White, 32 Colo. 114, 75 Pac. 416; Fuller v. Azusa etc. Co., 138 Cal. 204, 71 Pac. 98; Richey v. East Redlands etc. Co., 141 Cal. 221, 74 Pac. 754; Swanger v. Porter (Neb.), 128 N. W. 516, defining "mutual irrigation company." And other cases already cited *supra*.

[20] Civ. Code, sec. 324, as amended 1907.

[21] Miller v. Imperial W. Co. (1909), 156 Cal. 27, 103 Pac. 227, 24 L. R. A., N. S., 372.

[22] Leavitt v. Lassen Irr. Co. (1909), 155 Cal. 82, 106 Pac. 404.

[23] Article 15, section 1. "The use of all waters now appropriated, or that may hereafter be appropriated for sale, rental or distribution, *also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed*, is hereby declared to be a public use, and subject to the regulation and control of the State in the manner prescribed by law."

[1] Combs v. Agricultural D. Co., 17 Colo. 146, 31 Pac. 275, 28 Pac. 966; Slosser v. Salt River Co. (1901), 7 Ariz. 376, 65 Pac. 332. See case cited *supra*, sec. 1261, as to cases where consumers are all stockholders.

as he sees fit; and the reserved quantity remains his private property free of any duties to the public which shares in the use of the rest of the water. "For respondent, the most favorable view which can be taken of the evidence is that he made an appropriation of waters for the public use of sale, rental and distribution under the constitution of 1879; that by means of the same canal and ditches he made a private appropriation of waters for use upon his individual land, and that when he came to sell his irrigating system he withheld from the sale the waters so privately appropriated. It cannot be said that there was anything illegal in these acts."[2]

(3d ed.)

§ 1271. **Change from Public to Private Service.**—Having once entered into the *quasi* public calling, duties to the public are assumed, and cannot be withdrawn from the public or from public control for the benefit of favored private parties. It was recently said in a California case: "Treating Leavitt's appropriation as being wholly and entirely for public use, he, the owner of the system, was but an instrumentality for the distribution of the waters which he gathered to such members of the public as might apply for them and pay to him the legal charge for the service that he rendered. As the agent of such a public use, he had no power whatsoever to reserve to himself for his private purposes any part of this water. If he could reserve a part, he could reserve all, and thus, by his *ipse dixit*, convert a public use into private ownership, or, if he could reserve a part for himself, he could with equal authority give away parts of the supply to others, and by this method destroy what the constitution itself has declared shall forever remain a public use."[3]

Because of the *quasi* public nature of the calling, property of a water company in public service has been said to be exempt from the operation of mechanic's lien laws, on the ground that their operation would turn the property over to private ownership on a foreclosure sale.[4]

2 Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404.

3 Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404.

4 Guest v. Merion Water Co. (1891), 142 Pa. 610, 21 Atl. 1001, 12 L. R. A. 324. *Sed qu*, if the foreclosure purchaser is bound to serve the public likewise.

(3d ed.)

§ 1272. **Abandonment of All Service.**—A public service company, while it may not abandon the public service to enter into private service, may sell out to another having the power to render the same public service, and the successor is then under the same public duties as its predecessor.[5] But may it abandon all service entirely, without providing a successor?

A California case says: "We do not mean to say that a corporation engaged in the distribution of water to public uses may not abandon its property and quit the business, without being subject to mandatory proceedings to compel it to continue to carry it on. It may find it impossible to go on. Its supply may become exhausted or be insufficient for paramount needs; the rates fixed by law may be too small to enable it to operate at a profit, or without substantial loss; or it may conclude, without reason which the law would consider sufficient, that it will not continue. In case of a natural person it might become physically impossible. We do not intend to declare that in any such case mandatory process would be issued to compel the personal performance of the duty. These questions are not now involved and we express no opinion concerning them. But in such a case, it cannot continue in absolute control of the water and waterworks appropriated to the public service."[6] It is said, likewise *obiter,* in another case, "Having once enlisted in the public service, the company cannot withdraw."[7] It has been said that an irrigation company is not justified in abandoning the business for any reason short of physical impossibility.[8] These were but *dicta,* however. In actual decision such total withdrawal seems to be allowed, even though the company is the sole supply of the neighborhood.[9]

[5] Cal. Const., art. 12, sec. 10; South Pasadena v. Pasadena L. & W. Co., 152 Cal. 587, 93 Pac. 490, 497, 498; Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. 858, 15 L. R. A., N. S., 359; Orcutt v. Pasadena W. Co., 152 Cal. 599, 93 Pac. 497; Graham v. Pasadena etc. Co., 152 Cal. 596, 93 Pac. 498. (Cf. Hildreth v. Montecito Co., 139 Cal. 23, 72 Pac. 395.)

Concerning reorganization of irrigation companies, see Clague v. Tri-State etc. Co. (1909), 84 Neb. 499, 133 Am. St. Rep. 637, 121 N. W. 570; Farmers' etc. Co. v. Henderson (1909), 46 Colo. 37, 102 Pac. 1063. See, also, *infra,* sec. 1320, contracts.

[6] Fellows v. Los Angeles, 151 Cal. 52, 90 Pac. 137.

[7] Spring Valley W. Co. v. San Francisco, 165 Fed. 712.

[8] Gould v. Maricopa Co., 8 Ariz. 429, 76 Pac. 598. See, also, Farmers' Canal Co. v. Frank, 72 Neb. 136, 100 N. W. 286.

[9] Laighton v. City of Carthage, 157 Fed. 145, where a water company, when the city started a municipal plant, removed its own pipes and dismantled its plant, the city refusing to pay for any more water. See, also,

The matter is, of course, a serious one in these days of building new systems in public ownership; and there is room for argument that, while a distributor is subject to the rule of compulsory service so long as its property is devoted to public use, yet no one is compelled to so devote his property against his will unless it has been condemned under the power of eminent domain. Of course no one is allowed to abandon public service for private service, but where the withdrawal is total from all service, it is another matter. The public remedy would seem to be by condemnation under the power of eminent domain.

East Ohio Gas Co. v. City of Akron, 81 Ohio St. 33, 90 N. E. 40, 26 L. R. A., N. S., 92; Risley v. City of Utich, 179 Fed. 875. In Munn v. Illinois, 94 U. S. 113, at 126, 24 L. Ed. 77, there is a *dictum* that the company may withdraw and discontinue its service. If a public service irrigation company buys out all its consumers, there would seem a case where it can abandon public service even for private service. See Jackson v. Indian etc. Co., 18 Idaho, 513, 110 Pac. 251.

§§ *1273–1278. (Blank numbers.)*

CHAPTER 54.

DUTIES OF PUBLIC SERVICE.

§ 1279. Reasonable service to all.
§ 1280. Must serve all the public to the extent of capacity (compulsory service).
§ 1281. Or some class of the public.
§ 1282. With adequate facilities.
§ 1283. Equally and without discrimination.
§ 1284. Without priorities.
§ 1285. Same.
§ 1286. Without unreasonable conditions.
§ 1287. Upon tender of a reasonable rate.
§ 1288. Irrigation rates.
§ 1289. Same.
§ 1290. Miscellaneous duties.
§§ 1291–1297. (Blank numbers.)

(3d ed.)

§ 1279. Reasonable Service to All.—In most general terms, the duties of public service agencies resolve themselves into one fundamental thing—reasonableness toward the public. All the rules of public service resolve themselves into securing that end.[1] It is the law of "reasonable service upon tender of a reasonable rate."

More particularly, as a deduction from the ultimate test of reasonableness, the chief particular duties to the public imposed by law upon those engaged in serving the public are that they (1) must serve all the public to the extent of the capacity of the distributing system (compulsory service); (2) or some class of the public; (3) with adequate facilities; (4) equally and without discrimination; (5) without priorities; (6) without unreasonable conditions; and (7) upon tender of a reasonable rate. These are separately considered in this chapter in the order named.

[1] It is, in last analysis, the same idea which has given the common-law test of use between riparian proprietors—so use your own property as to cause no unreasonable hardship upon others—and which forms the basis of the new law of percolating water. In a sense, it is, as said in Munn v. Illinois, the maxim, *"Sic utere tuo ut alienum non laedas"*; the "alienum," in regard to public service, being "the public."

(3d ed.)

§ 1280. Must Serve All the Public to the Extent of Capacity (Compulsory Service).—Since the law of public service is chiefly framed to prevent abuse of monopoly, so one of its leading features is that the monopoly must hold out its service to all the public, to the extent of the capacity of its distributing system or plant. As was said in an early case:[2] "Whenever water is appropriated for distribution and sale, the public has a right to use it." One in control of a public use of water is under the obligation to supply water to the beneficiaries of that use so long as they tender a reasonable rate and comply with the reasonable conditions on which the use is administered.[3] In a recent California case it is said by Mr. Justice Shaw:[4] "It is the settled doctrine of this State that a water company engaged in the administration of the public use of distributing water to the inhabitants of a community or neighborhood, whether inside or outside of a city or town, is not only under a duty and obligation to supply the water in proper proportion to the persons composing the class for which the use was created, but further, that if such company, upon proper demand and tender of the established rates, refuses to furnish the water, or threatens to cut off the supply, a proceeding in *mandamus* may be maintained or an injunction issued, to compel the service, or prevent the deprivation thereof." This principle is one of general application.[5] Statutes usually expressly so declare, as cited in

[2] McCrary v. Beaudry, 67 Cal. 120, 7 Pac. 264. See likewise Price v. Riverside Co., 56 Cal. 443.

[3] Mahoney v. American L. & W. Co., 2 Cal. App. 185, 83 Pac. 267.

[4] Fellows v. Los Angeles, 151 Cal. 52, 90 Pac. 137. Accord, South Pasadena v. Pasadena L. & W. Co. (1908), 152 Cal. 579, 93 Pac. 490.

[5] The following authorities more or less directly support this principle:

Arizona.—Slosser v. Salt River Co., 7 Ariz. 376, 65 Pac. 332; Hayois v. Salt River Co., 8 Ariz. 285, 71 Pac. 944; Gould v. Maricopa Co., 8 Ariz. 429, 76 Pac. 598; Salt River Co. v. Nielssen, 10 Ariz. 9, 85 Pac. 117, 12 L. R. A., N. S., 711, 16 Ann. Cas. 796.

California.—Price v. Riverside Co., 56 Cal. 431; People v. Stephens, 62 Cal. 209; McCreary v. Beaudry, 67 Cal. 120, 7 Pac. 264; Merrill v. Southside Irr. Co., 112 Cal. 426, 44 Pac. 720; Crow v. San Joaquin etc. Irr. Co., 130 Cal. 309, 62 Pac. 562, 1058; Hildreth v. Montecito Co., 139 Cal. 23, 72 Pac. 395; Fellows v. Los Angeles, 151 Cal. 52, 90 Pac. 137; South Pasadena v. Pasadena L. & W. Co., 152 Cal. 579, 93 Pac. 490; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404; Lassen Irr. Co. v. Long, 157 Cal. 94, 106 Pac. 409; Lowe v. Yolo W. Co. (1910), 157 Cal. 503, 108 Pac. 297. In the district court of appeals (inferior to the supreme court): Mahoney v. American L. & W. Co., 2 Cal. App. 185, 83 Pac. 267; Cozzens v. North Fork etc. Co., 2 Cal. App. 404, 84 Pac. 342; Lowe v. Yolo etc. Co., 8 Cal. App. 167, 96 Pac. 379 (affd. in supreme court, *ut supra*). See, also, Stats. 1885, p. 95, and Stats. 1911, c. 719, quoted *infra*, Part VIII.

Colorado.—Wheeler v. Northern etc. Co., 10 Colo. 582, 3 Am. St. Rep.

the preceding note; but, as already said, the rule is the same at common law, in the absence of statute.

Since the company is thus bound by law to serve all the public upon tender of a reasonable rate, it has been held that it cannot demand a fee or bonus for furnishing the service; it may collect only what is *bona fide* a rate or rental, and not what is only a rate by subterfuge and might be really called an "initiation fee" or bonus.[6] Thus, it has been held that the public service company

603, 17 Pac. 487; Wyatt v. Larimer & Weld Irr. Co., 18 Colo. 298, 308, 36 Am. St. Rep. 280, 33 Pac. 144, reversing 1 Colo. App. 480, 29 Pac. 906; Junction Irr. D. Co. v. City of Durango, 21 Colo. 194, 196, 40 Pac. 356; Farmers' Independent D. Co. v. Agricultural D. Co., 22 Colo. 513, 521, 55 Am. St. Rep. 149, 45 Pac. 444; Schneider v. People, 30 Colo. 493, 71 Pac. 369; Northern etc. Co. v. Pouppirt, 47 Colo. 490, 108 Pac. 23. *Statutes.*—Rev. Stats. 1908, secs. 992, 3254, 3255, 3257, 3264, 3271-3275; Laws 1897, p. 96, sec. 3; Laws 1887, pp. 305, 308 et seq., 312; Laws 1893, p. 299, sec. 1. The statutes are very emphatic, as below quoted in the compilation of Colorado statutes.

Idaho.—Wilterding v. Green, 4 Idaho, 773, 45 Pac. 134; Hard v. Boise etc. Co., 9 Idaho, 589, 76 Pac. 331, 65 L. R. A. 407; Bardsley v. Boise etc. Co., 8 Idaho, 155, 67 Pac. 428; Boise etc. Co. v. Boise City (Idaho), 123 Fed. 232, 59 C. C. A. 236; Shelby v. Farmers' etc. Co. (1905), 10 Idaho, 723, 80 Pac. 222; Gerber v. Nampa Irr. Dist., 16 Idaho, 1, 100 Pac. 80; Niday v. Barker (1909), 16 Idaho, 73, 101 Pac. 254; Knowles v. New Sweeden Irr. Dist. (1909), 16 Idaho, 217, 101 Pac. 81; Hatch v. Consumers Co., 17 Idaho, 204, 104 Pac. 670. *Statutes.*—McLean's Rev. Codes, secs. 3240, 3248, 3289, 3290, 3291, 7149; Const., art. 15, sec. 4; Rev. Stats. 1887, sec. 3189; Laws 1901, p. 191, sec. 9b; Laws 1899, p. 380, secs. 19, 20; Laws 1895, p. 174, sec. 14.

Kansas.—Western Irr. Co. v. Chapman, 8 Kan. App. 778, 59 Pac. 1098. See Gen. Laws (1909), sec. 4503 et seq.

Montana.—State ex rel. Crawford v. Minnesota etc. Co., 20 Mont. 198, 50 Pac. 420 (quaere); Civ. Code, sec. 1897 et seq. See Const., art. 3, sec. 15.

Nebraska.—Farmers' Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. 286; Sammons v. Kearney Power & Irr. Co., 77 Neb. 580, 110 N. W. 308, 8 L. R. A., N. S., 404; Cobbey's Ann. Stats., secs. 6800, 6811; Laws 1895, c. 69, p. 261, secs. 46, 57.

New Mexico.—Albuquerque Land & Irr. Co. v. Guiterrez, 10 N. M. 177, 61 Pac. 357; Candelaria v. Vallejos, 13 N. M. 146, 81 Pac. 589.

South Dakota.—Stats. 1907, c. 80, secs. 19, 36.

Texas.—Colorado Canal Co. v. McFarland & Southwell (Tex. Civ. App.), 94 S. W. 400; Same v. Same, 50 Tex. Civ. App. 92, 109 S. W. 435.

Utah.—See Miller v. Mt. Nebo etc. Co. (Utah, 1910), 106 Pac. 504.

Washington.—Prescott Irr. Co. v. Flathers, 20 Wash. 454, 55 Pac. 635. Compare State ex rel. Foley v. Hilliard W. Co. (Wash. 1908), 94 Pac. 1080.

[6] Crow v. San Joaquin Irr. Co., 130 Cal. 309, 62 Pac. 562, 1058; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404; Lowe v. Yolo W. Co., 8 Cal. App. 167, 96 Pac. 379; affd. in 157 Cal. 503, 108 Pac. 297; Wheeler v. Northern Irr. Co., 10 Colo. 582, 3 Am. St. Rep. 603, 17 Pac. 487; Combs v. Agric. D. Co., 17 Colo. 146, 31 Am. St. Rep. 275, 28 Pac. 966; Northern Irr. Co. v. Richards, 22 Colo. 450, 45 Pac. 423; Schneider v. People, 30 Colo. 493, 71 Pac. 369; Wilterding v. Green, 4 Idaho, 773, 45 Pac. 134; Green v. Byers, 16 Idaho, 178, 101 Pac. 79; Hatch v. Consumers Co., 17 Idaho, 204, 104 Pac. 670; San Diego etc. Co. v. City of National City, 74 Fed. 79; Lanning v. Osborne, 76 Fed. 319; Mandell v. San Diego etc. Co., 89 Fed. 295; San Diego etc. Co. v. Jasper, 110 Fed. 706; Souther v. San Diego etc. Co., 112 Fed. 228. (But, *semble contra*, San Diego Flume Co. v.

cannot, as a prerequisite for service, demand the signing of a contract containing unreasonable terms;[7] nor demand that the consumer buy shares of the company's stock;[8] nor demand that the consumer pay all back dues in arrears[9] (the company's remedy being by demanding payment in advance in the future and by suit to recover the arrears); nor demand an advance payment for a perpetual "water-right";[10] nor demand a waiver of the law of compulsory service, or of other rights under the law.[11] To exact anything in the way of a bonus, prerequisite or premium before furnishing the service is sometimes, by statute, punishable criminally.[12]

The duty to furnish the supply, being a public duty, is enforced by the writ of *mandamus*.[13] Moreover, for the damage suffered

Souther, 104 Fed. 706, 44 C. C. A. 143; Fresno etc. Co. v. Park, 129 Cal. 437, 62 Pac. 87.)

7 Green v. Byers (1909), 16 Idaho, 178, 101 Pac. 79.

8 Combs v. Agric. D. Co., 17 Colo. 146, 31 Am. St. Rep. 275, 28 Pac. 966; Gould v. Maricopa etc. Co., 8 Ariz. 429, 76 Pac. 598; Wheeler v. Northern Irr. Co., 10 Colo. 582, 3 Am. St. Rep. 603, 17 Pac. 487; Baker etc. Co. v. Baker City (Or.), 113 Pac. 9.

9 Crow v. San Joaquin etc. Co., 130 Cal. 309, 62 Pac. 562, 1058; Shelby v. Farmers' etc. Co., 10 Idaho, 723, 80 Pac. 222; Kimball v. Northern Irr. Co., 42 Colo. 412, 94 Pac. 333; Hatch v. Consumers Co., 17 Idaho, 204, 104 Pac. 670; Merrimac etc. Bk. v. City of Lowell, 152 Mass. 556, 26 N. E. 97, 10 L. R. A. 122. But if the consumer is *wasting* the water without payment, the supply may be shut off. Matthews Co. v. City of Buffalo, 126 N. Y. Supp. 596.

10 Wheeler v. Northern Irr. Co. (1888), 10 Colo. 582, 3 Am. St. Rep. 603, 17 Pac. 487; San Diego etc. Co. v. City of National City, 74 Fed. 79; Mandell v. San Diego etc. Co., 89 Fed. 295; San Diego etc. Co. v. Jasper, 110 Fed. 706; Idaho Rev. Codes, sec. 3290; Laws 1899, p. 380, sec. 20; Souther v. San Diego Co., 112 Fed. 228. (But *semble contra*, Fresno Co. v. Park, 129 Cal. 437, 62 Pac. 87; San Diego Flume Co. v. Souther, 104 Fed. 706, 44 C. C. A. 143.) See *infra*, sec. 1326.

11 San Diego Co. v. Sharp, 97 Fed. 394, 38 C. C. A. 220; Gould v. Maricopa etc. Co., 8 Ariz. 429, 76 Pac. 598.

12 E. g., Schneider v. People, 30 Colo. 493, 71 Pac. 369, concerning a statute prohibiting a company from exacting a bonus, and making refusal to supply a misdemeanor. Colo. Stats. 1887, p. 308; Rev. Stats. 1908, sec. 3271, quoted below, Part VIII; Idaho Rev. Codes, secs. 3257, 7149; Laws 1889, p. 380, sec. 18. See similarly, People v. Palermo W. Co., 4 Cal. App. 717, 89 Pac. 723, 725.

13 Price v. Riverside Co., 56 Cal. 433; Fellows v. Los Angeles, 151 Cal. 52, 90 Pac. 137; State v. Washington Irr. Co., 41 Wash. 283, 111 Am. St. Rep. 1019, 83 Pac. 308; Perrine v. San Jacinto etc. Co., 4 Cal. App. 376, 88 Pac. 293; Wheeler v. Northern Irr. Co., 10 Colo. 582, 3 Am. St. Rep. 603, 17 Pac. 487; McLaughlin, J., in Cozzens v. North Fork etc. Co., 2 Cal. App. 404, 84 Pac. 342, concurring opinion; Miller v. Imperial W. Co. (1909), 156 Cal. 27, 103 Pac. 227, 24 L. R. A., N. S., 372 (holding *mandamus* lies by stockholder of a *mutual* company); Hatch v. Consumers (1909), 17 Idaho, 204, 104 Pac. 670; Bardsley v. Boise Irr. Co. (1901), 8 Idaho, 155, 67 Pac. 428; Niday v. Barker (1909), 16 Idaho, 73, 101 Pac. 254; South Pasadena v. Pasadena Co., 152 Cal. 579, 93 Pac. 490; Northern etc. Co. v. Pouppirt, 47 Colo. 490, 108 Pac. 23. See, generally, cases cited in note 5, *supra*. The consumer must be in a position to use the water before applying for *mandamus*. Niday v.

from refusal of supply, the company will be liable *in tort*,[14] and where willful and oppressive, exemplary damages,[15] and the burden is upon the company to show good reason for refusing a supply.[16] The company is not liable, however, unless it unwarrantedly refused to supply water, or if, through the failure to exercise ordinary care in a matter which it could control, it suffered its supply to run short.[17]

How far the duty of serving all will prevent abandonment of the business is a matter not wholly settled.[18]

(3d ed.)

§ **1281. Or Some Class of Public.**—Reasonable classification of the public may be made. One instance of this is where the natural situation of the facilities demands that service be limited to specific classes of the public. Where a portion of the company's supply is consumed within a fixed area and affords adequate facilities for that only, it may restrict that portion of its supply to lands so situated. "The foregoing statement that a water company, or person in charge of water devoted to public use cannot confer a preferential right upon one consumer over another, is not to be understood as denying the right of such company or person in possession of a limited amount of water to devote that amount to the irrigation of a given area of land. We are not to be understood as saying that the company may not fix the limits of this territory, and lawfully agree to supply its waters, first, to the lands within that territory, and to supply to outsiders only such surplus as there may be after the needs of the original territory for which the water was procured are satisfied. This

Barker (1909), 16 Idaho, 73, 101 Pac. 254.

[14] Crow v. San Joaquin Co., 130 Cal. 309, 62 Pac. 562, 1058; Cal. Stats. 1885, p. 95 (providing for five days' notice of demand for supply).

[15] Lowe v. Yolo W. Co., 8 Cal. App. 167, 96 Pac. 379; affd. in 157 Cal. 503, 108 Pac. 297, March 30, 1910.

[16] Gerber v. Nampa Irr. Dist., 16 Idaho, 1, 100 Pac. 80. See, also, Miller v. Mt. Nebo etc. Co. (Utah, 1910), 106 Pac. 504.

The measure of damages for refusal to supply water for irrigating a meadow is the cost of restoring the land to the condition it would be in if supplied, and the value of the use of the land during the time lost. It would be different in the case of growing trees, which cannot be restored. Lowe v. Yolo etc. Co., 157 Cal. 503, 108 Pac. 297, March 30, 1910.

[17] Lassen Irr. Co. v. Long, 157 Cal. 94, 106 Pac. 409. Compare Niehaus Bros. v. Contra Costa W. Co. (Cal.), 113 Pac. 375, January 16, 1911, holding a city water company not liable in damages to a private party (in absence of contract) for failure of water supply in case of fire.

[18] *Supra*, sec. 1272.

would not be in derogation of the public trust, but would be a mere regulation of use in the performance of the trust." [19]

A similar classification becomes necessary when the capacity of a plant is fully taken up. In the case of gas companies, for example, it is possible (with capital) to extend the facilities at will, and (perhaps) the company might be required to increase its capacity with increase in demand or number of consumers, and not refuse supply to any because of shortage.[20] But the supply of a water company is usually limited by nature and not elastic, and the rule is usually held to be that irrigation companies in the public service class cannot lawfully undertake to supply consumers beyond their capacity, and a consumer may get an injunction against an attempt to do so.[21] Where its facilities are in full use by existing consumers, it cannot withdraw or cut down the supply of some of them in order to serve new customers,[22] even though the new consumers be more favorably situated.[23] The new consumers can insist only on use of such surplus as there may be and only at such times as there may be such a surplus,[24] although so long as the surplus exists, the rule of compulsory service applies to it.[25]

[19] Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404. See Idaho Laws 1901, p. 191, sec. 9a; Rev. Codes, sec. 3287.

[20] See State ex rel. Word v. Consumers etc. Co., 157 Ind. 345, 61 N. E. 674, 55 L. R. A. 245; Fairchance Co. v. Star Gas Co., 66 Leg. Int. (Pa.) No. 29.

[21] Gould v. Maricopa etc. Co., 8 Ariz. 429, 76 Pac. 598; Wyatt v. Larimer Irr. Co., 18 Colo. 298, 36 Am. St. Rep. 280, 33 Pac. 144; Broadmoor etc. Co. v. Brookside etc. Co., 24 Colo. 541, 52 Pac. 792; McDermont v. Anaheim etc. Co., 124 Cal. 112, 56 Pac. 779; Lanning v. Osborne (C. C.), 76 Fed. 319; Souther v. San Diego Co., 112 Fed. 228; New La. Junta etc. Co. v. Kreybill, 17 Colo. App. 26, 67 Pac. 1026; La Junta etc. Co. v. Hess, 6 Colo. App. 497, 42 Pac. 50; Water Supply etc. Co. v. Larrimer Co., 24 Colo. 322, 51 Pac. 496, 46 L. R. A. 322; Blakely v. Ft. Lyon etc. Co., 31 Colo. 224, 73 Pac. 249; Gerber v. Nampa Irr. Dist., 16 Idaho, 1, 100 Pac. 80.

[22] Larimer etc. Co. v. Wyatt, 23 Colo. 480, 48 Pac. 528; Combs v. Agric. D. Co., 17 Colo. 146, 31 Am. St. Rep. 275, 28 Pac. 966; Gerber v. Nampa Irr. Dist., 16 Idaho, 1, 100 Pac. 80; Idaho Const., art. 15, sec. 4; Colo. Rev. Stats. 1908, sec. 3264; Laws 1879, p. 96, sec. 3. See Hildreth v. Montecito Co., 139 Cal. 23, at 28, 72 Pac. 395.

[23] San Diego etc. Co. v. Sharp, 97 Fed. 394, 38 C. C. A. 220; Mandell v. San Diego etc. Co., 89 Fed. 295.

[24] Gerber v. Nampa Irr. Dist., 16 Idaho, 1, 100 Pac. 80. Cf. Utah Comp. Laws 1907, sec. 1288x27, covering "primary" and "secondary" rights.

[25] *Ibid.*, and Niday v. Baker, 16 Idaho, 73, 101 Pac. 254.

It has, however, been suggested (though not decided) that the company is not limited to taking consumers only to its capacity, but must, because of its duty to serve all the public, take all who apply and force the existing users to pro-rate with the new ones, as noted above in regard to gas companies. See Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404; Lowe v. Yolo Co., 157 Cal. 503, 108 Pac. 297, March 30, 1910 (affirming S. C., 8 Cal. App. 167, 96 Pac. 379), the latter leaving the question open.

The duty to serve all the public may be limited by reasonable classification; especially such classification of the public as is made necessary by natural conditions over which the distributor has no control.

(3d ed.)

§ 1282. **With Adequate Facilities.**—The company must provide reasonable facilities to enable it to deliver supply to its consumers.[1]

The company must put in necessary headgates on demand of a consumer,[2] and provide all reasonable facilities for delivering water to the consumer,[3] and must at its own cost (at least in cities) make all necessary connections with the consumers' property,[4] such as building laterals to the line of the consumer's premises (in a city).[5] The company has the duty of keeping its main canal in repair at its own cost sufficient to deliver water to distant consumers.[6] It is the duty of the canal company to turn the water out at the most convenient point to the consumer, and where it will cause the least waste by seepage or evaporation, provided the consumer has means of receiving it there.[7] A common statutory

[1] Downey v. Twin Lakes Co., 41 Colo. 385, 92 Pac. 946; Niday v. Barker (1909), 16 Idaho, 73, 101 Pac. 254; Sisk v. Gravity Canal Co. (Tex. Civ. App. 1908), 113 S. W. 195; International Co. v. City of El Paso, 51 Tex. Civ. App. 321, 112 S. W. 816; Gerber v. Nampa Irr. Dist., 16 Idaho, 1, 100 Pac. 80. See, also, though not specifically in point, the following: Green v. Byers (1909), 16 Idaho, 178, 101 Pac. 79; Lowe v. Yolo etc. Co., 8 Cal. App. 167, 96 Pac. 379; Tarpey v. Lynch (1909), 155 Cal. 407, 100 Pac. 10; Crow v. San Joaquin etc. Co., 130 Cal. 309, 62 Pac. 562, 1058; Bean v. Stoneman, 104 Cal. 49, 37 Pac. 777, 38 Pac. 39; Hatch v. Consumers Co., 17 Idaho, 204, 104 Pac. 670. But see Nampa Irr. Dist. v. Gess, 17 Idaho, 552, 106 Pac. 993.

[2] Downey v. Twin Lakes Co., 41 Colo. 383, 92 Pac. 946; Idaho Rev. Codes, sec. 3286; Laws 1897, p. 127, sec. 2. But see Mont. Civ. Code, sec. 1898.

[3] Sisk v. Gravity Canal Co. (Tex. Civ. App. 1908), 113 S. W. 195.

[4] International Co. v. City of El Paso, 51 Tex. Civ. App. 321, 112 S. W. 816.

[5] Hatch v. Consumers Co., 17 Idaho, 204, 104 Pac. 670. But see Mont. Civ. Code, sec. 1898.

[6] Niday v. Barker (1909), 16 Idaho, 73, 101 Pac. 254. See Idaho Rev. Codes, secs. 3300, 3307; Laws 1899, sec. 16. But see Nampa Irr. Dist. v. Gess, 17 Idaho, 552, 106 Pac. 993.

[7] Niday v. Barker, (1909), 16 Idaho, 73, 101 Pac. 254. In the report of the United States Department of Agriculture, Office of Experiment Stations, for 1909, it is said (pp. 378–379): "Seepage losses have been the cause of much contention between canal-owners and the persons using water under them. Most water-right contracts provide for the delivery of a certain quantity of water to each user, but contain a provision that in case of scarcity whatever water the canal supplies shall be pro-rated among all the holders of rights. In practice this places the burden of seepage losses on the water users rather than

provision is that owners shall maintain canals or ditches in good order by April 15th in each year, and construct necessary outlets for delivery of the water.[7a]

For maintenance of facilities the distributor may charge consumers in addition to rental for the water.[8]

(3d ed.)

§ 1283. **Equally and Without Discrimination.**—"All are equally entitled to share in the use of the water who pay, or offer to pay, the legal rate, and to abide by the reasonable rules and regulations of the company."[9] Discrimination in any form is hostile to the law of public service companies.[10]

An attempt by the company to bind its entire supply to a single consumer,[11] or to give one consumer exclusive rights,[12] is illegal.

Whether all consumers are entitled to the same rate, *quaere.* In one case it is said: "We do not apprehend that rental charges for the use of water from irrigating canals is based upon the actual expenses of carriage and delivery to each individual consumer.

on the company, although the company is responsible for the care of the canal. Such losses have also caused some contention between canal-owners and the public officials charged with distributing water from streams in States where rights are limited to a fixed quantity per acre served, as in Wyoming, Nebraska, and Nevada. The companies contend that they should be allowed enough water to deliver the legal quantity at the point of use, while the officials contend that the quantity should be measured at the headgate, placing the burden of preventing loss on the canal-owners. The latter system would undoubtedly have a tendency to check losses, while the other would place a premium on poor construction and careless maintenance."

7a Colorado, Rev. Stats. 1908, sec. 3255; Laws 1887, p. 305, sec. 2 (see, also, Rev. Stats. 1908, sec. 993.) Substantially copied in Idaho Laws 1899, p. 380, sec. 16; Rev. Codes, sec. 3307. See, also, Nev. Stats. 1911, c. 162; Or. Stats. 1911, c. 279, p. 483, sec. 7; Wash. Stats. 1911, c. 117, sec. 26; Kan. Stats. 1911, c. 213, p. 377.

8 Nampa Irr. Dist. v. Gess, 17 Idaho, 552, 106 Pac. 993.

9 Leavitt v. Lassen Irr. Co. (1908), 157 Cal. 82, 106 Pac. 404.

10 Leavitt v. Lassen Irr. Co. (1909), 157 Cal. 82, 106 Pac. 404; Crow v. San Joaquin Co., 130 Cal. 309, 62 Pac. 562, 1068; Lassen Irr. Co. v. Long, 157 Cal. 94, 106 Pac. 409; Sammons v. Kearney Irr. Co., 77 Neb. 580, 110 N. W. 308, 8 L. R. A., N. S., 404; Gould v. Maricopa Co., 8 Ariz. 429, 76 Pac. 598; Hatch v. Consumers Co. (1909), 17 Idaho, 204, 104 Pac. 670; State ex rel. Ferguson v. Bermingham W. Co. (1910), 164 Ala. 586, 51 South. 354; Niday v. Barker, 16 Idaho, 1, 101 Pac. 254; State ex rel. Latshaw v. Board etc. of Duluth, 105 Minn. 472, 127 Am. St. Rep. 581, 117 N. W. 827; Lanning v. Osborne, 76 Fed. 319; San Diego Co. v. Sharpe, 97 Fed. 394, 38 C. C. A. 220; Wash. Stats. 1911, c. 117, sec. 30 et seq. See, also, cases cited *supra,* in regard to compulsory service.

11 Sammons v. Kearney Irr. Co., 77 Neb. 580, 110 N. W. 308, 8 L. R. A., N. S., 404.

12 Leavitt v. Lassen Irr. Co., *supra;* Hartford etc. Co. v. City of Houston (Tex. Civ. App.), 110 S. W. 973.

If that were true, the rate charged to the landowner at the upper end of the main canal would be comparatively insignificant, while the rate charged to the man who lives at the extreme end of the canal fifty or sixty miles from its intake would be so enormous and exorbitant as to prohibit its use and make agricultural pursuits an impossibility with him. This is not the theory on which water rates are established.'' [13]

A contract fixing rates having expired, the consumer is entitled under the general law to continued service at the rate regularly charged others, though lower than the contract rate.[14]

(3d ed.)

§ 1284. **Without Priorities.**—To the extent that the arid States consider the consumers appropriators and recognize priorities among them, based on time of commencement of use, the rule against discrimination seems to be modified; [15] but in the States where the consumer is not regarded as an appropriator, the rule against discrimination negatives priorities among consumers.

In a late California case it is held: ''The fundamental and all-important proposition, then, is this, that a public service water company which is appropriating water under the constitution of 1879, for purposes of rental, distribution and sale, cannot confer upon a consumer any preferential right to the use of any part of its water''; [16] which was followed by another case saying: ''For the reasons there given, this defendant could not acquire any permanent preferential right to the use of the water over any other member of the public entitled to draw his water supply from the same public service corporation. For this reason alone, the judgment must be reversed.'' [17]

[13] Niday v. Barker, 16 Idaho, 73, 101 Pac. 254. See, also, Lanning v. Osborne, 76 Fed. 319. But see Stanislaus Co. v. San Joaquin etc. Co., 192 U. S. 201, 24 Sup. Ct. Rep. 241, 48 L. Ed. 406. And Boise City etc. Co. v. Turner (Idaho), 176 Fed. 373.

[14] San Diego Co. v. Sharp, 97 Fed. 394, 38 C. C. A. 220. But see a case holding that so long as rates charged other consumers remain reasonable, the company may grant concessions to favored consumers in absence of evidence of bad faith. State ex rel. Ferguson v. Bermingham W. Co. (1910), 164 Ala. 586, 51 South. 354.

[15] *Infra*, secs. 1338, 1343.

[16] Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404.

[17] Lassen Irr. Co. v. Long, 157 Cal. 94, 106 Pac. 409. See, also, Souther v. San Diego etc. Co., 112 Fed. 228; Souther v. San Diego etc. Co., 121 Fed. 347, 57 C. C. A. 561; Rickey v. East Redlands Co., 141 Cal. 221, 74 Pac. 754; Lowe v. Yolo etc. Co., 8 Cal. App. 204, 96 Pac. 379, 157 Cal. 503, 108 Pac. 297; Clague v. Tri-State Co., 84 Neb. 499, 133 Am. St. Rep. 637, 121 N. W. 570; Farmers' etc. Co. v. Brumbaugh, 81 Neb. 641, 116 N. W. 514.

In times of deficiency, the consumers must pro-rate; for to prefer one over the other and give him priority in service would be discrimination against the others.[18]

This refers to pro-rating shortage; whether the company can enforce pro-rating among existing consumers in order to admit taking new consumers beyond the capacity of its plant to supply all fully, is another question. It is usually held that such cannot be done; that the company cannot lawfully undertake to supply consumers beyond its capacity to supply all fully.[19]

(3d ed.)

§ 1285. **Same.**—From the rule that the company must not undertake to extend its service beyond the limit placed by nature upon its facilities, together with the rule that it must serve the public equally and without discrimination, the following is suggested as a summary of principles:

(a) The company must receive consumers indiscriminately until its ordinary supply is in full use.

(b) Consumers of the ordinary supply (or primary consumers) are equal in right, regardless of time of beginning use. They are entitled to a continuance of full supply so long as normal conditions remain, while they must pro-rate any deficiency in times of natural scarcity of supply.

(c) When the ordinary supply is fully devoted to such consumers, additional (or secondary) consumers cannot be admitted thereto, the facilities having been exhausted; but may demand (and must be given) any surplus that may exist under extraordinary conditions or times.

(d) New (or secondary) consumers can be admitted into the ordinary supply only as there is a vacancy, but when so admitted, are equal in right with other (or primary) consumers of the ordinary supply, without regard to priorities or relative time of beginning use.

In short, the distributor of water to public use must use reasonable efforts to provide facilities for reasonable demands, and at the same time may not (and must not) undertake to supply demands beyond the natural limit of those facilities.

The law upon this matter is just being worked out, however, and is not yet settled.

[18] See cases just cited. See especially Leavitt v. Lassen Irr. Co. 157 Cal. 82, 106 Pac. 404.

[19] *Supra*, sec. 1281.

(3d ed.)

§ 1286. **Without Unreasonable Conditions.**—The company may require payment in advance, and may make such other conditions and regulations as are reasonable. Some of the conditions on which it may insist are stated in the following: "As we understand the duties imposed on corporations which have appropriated water for sale or irrigating purposes, before they can be compelled to perform that duty, there must exist the following conditions; the same appearing in the complaint or petition for a writ: (1) The land for which water is sought to irrigate must be within the flow of said water ditch; (2) a showing that such corporation has the water in quantity required to supply the one demanding and all the others entitled; (3) that notice be given the irrigating company of the amount of water required; and (4) payment of the rates or tender thereof when due and an allegation of willingness to pay when due."[20]

Speaking generally, reasonable rules and regulations are within the proper sphere of the company's right to make.[21]

The company may require payment in advance, but failing to do so, its remedy is by suit to recover the same, and not by shutting off the water.[22]

How far it may prescribe the mode of use by the consumer is likely to be a difficult question. It has arisen in Idaho in connec-

[20] Cozzens v. North Fork Ditch Co., 2 Cal. App. 404, 84 Pac. 342.

[21] As an example, the following are the regulations of the Yolo Consolidated Water Company in California as given in Bulletin 207, Office of Experiment Stations, United States Department of Agriculture:

"1. All users of water will leave orders for same at the offices of the company.

"2. No water will be furnished to any land where the bill for water for the preceding year has not been paid.

"3. All users of water on branch ditches will be charged for same from the time it is turned in at the main ditch until turned off.

"4. Water used on side ditches will be distributed in rotation, and all persons using water will be required to take same while it is in that ditch or wait until it is turned in for next general irrigation.

"5. Interest will be charged on all bills not paid within thirty days.

"6. Water turned on to any user will be charged for until notice is given by said user to turn off same.

"7. Side or association ditches will appoint some member of their ditch company to look after and handle water, and keep time for same.

"8. Parties ordering water will be charged for the same."

[22] Shelby v. Farmers' etc. Co., 10 Idaho, 723, 80 Pac. 222; Kimball v. Northern etc. Irr. Co., 42 Colo. 412, 94 Pac. 333; Sheward v. Citizens' etc. Co., 90 Cal. 635, 27 Pac. 439; Crow v. San Joaquin Co., 130 Cal. 309, 62 Pac. 562, 1058; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404; Hatch v. Consumers' Co., 17 Idaho, 204, 104 Pac. 670. Compare Bardsly v. Boise Co., 8 Idaho, 155, 67 Pac. 428; Merrimac Bank v. City of Lowell, 152 Mass. 556, 26 N. E. 97, 10 L. R. A. 122. *Supra*, sec. 1280, compulsory service. After default by the consumer, delivery by company of more water and accepting rental therefor

tion with attempts by the company to prohibit the practice, now becoming of importance, called "rotation," whereby a number of consumers pool their individual rights and use the whole flow for short periods of time, substituting a periodical use of the whole for a continuous use of part. In a recent case it was held that customers of an irrigation company may agree among themselves to use the water as they see fit, which may be by rotation, so long as they ask only a continuous flow from the company. Having entered into an agreement among themselves they may join as plaintiffs in *mandamus* to compel the company to deliver the water, though the company objected to the rotation among themselves.[23]

Quaere, whether the company can, by regulation or contract, prevent the consumer from changing his place of use, restricting it to a specific tract of land, or prevent him from reselling the water when he is through with it, or is not using it.[24]

A California statute says the company shall have no control over the water after its delivery to the purchaser.[25]

Unreasonable regulations, or those which contravene the duties imposed by law of reasonable service upon tender of a reasonable rate, are beyond the company's power to bind the consumer. "He cannot be required, as a condition precedent to the exercise of this right, to acknowledge the equity of all the rules adopted by the ditch owner; to say that he could, would be, in a measure, to place him at the mercy of such proprietor, for he could thus be coerced into compliance with the most oppressive and unjust regulation."[1]

The test is undoubtedly a question of fact in each case whether the company's contract or regulation concerning the mode of use is unreasonable.

waives forfeiture. Kimball v. Northern etc. Co., 42 Colo. 412, 94 Pac. 333. And a waiver once suffered cannot be recalled. (*Ibid.*) But if the consumer is *wasting* the water without paying, his supply may be shut off. Matthews Co. v. City of Buffalo, 126 N. Y. Supp. 596.

[23] Helprey v. Perrault, 12 Idaho, 451, 86 Pac. 417.

[24] See Calkins v. Sorosis etc. Co., 150 Cal. 426, 88 Pac. 1094; Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. 858; Hard v. Boise etc. Co., 9 Idaho, 589, 76 Pac. 331, 65 L. R. A. 407, seeming to deny the validity of such restriction. But, as elsewhere pointed out, the trend of the law in general terms is to-day against such changes. *Supra,* secs. 282, 506, 509. See Mont. Civ. Code, sec. 1900.

[25] Stats. 1880, p. 16, sec. 5.

[1] Golden Canal Co. v. Bright, 8 Colo. 149, 6 Pac. 142. See Nev. Stats. 1911, c. 162; Or. Stats. 1911, c. 483, sec. 43; Wash. Stats. 1911, c. 117, sec. 26.

(3d ed.)

§ 1287. **Upon Tender of a Reasonable Rate.**—The establishment of rates by corporations or persons in public service of this kind rests with such body as the constitution or statutes of the State provide, but in the absence of such provision, or of any action under it, the courts will act by *mandamus*, injunction or other process (where charges are unreasonable or excessive) to enforce a reasonable service upon tender of a reasonable rate.[2]

A court cannot itself fix a rate,[3] but it may enjoin collection of unreasonable rates, or the consumer may (it would seem upon principle) tender a rate and *mandamus* will issue if a jury (or court) considers the tender a reasonable one (a question of fact). It is true that a California statute declares that, in the absence of public rate-fixing, the company may fix its own rates,[4] and also that rates may be fixed by contract;[5] but it has been held that what the company is entitled to in the absence of public rates is "the reasonable value of the services rendered," and that an improper contract will be disregarded;[6] and the statutes, so far as they go further in favor of the company, are probably unconstitutional.[7] This is further considered in a following chapter.[8]

The definition of what is a reasonable rate is involved in the chapter devoted to statutory rate regulation.[9]

(3d ed.)

§ 1288. **Irrigation Rates.**—Irrigation charges vary greatly throughout the country. Some causes of variation are: Locality (whether in an arid or only semi-arid region); water supply

2 Wheeler v. Northern Irr. Co., 10 Colo. 582, 3 Am. St. Rep. 603, 17 Pac. 487; San Diego etc. Co. v. San Diego, 118 Cal. 556, 62 Am. St. Rep. 261, 50 Pac. 633, 38 L. R. A. 460; Same v. Jaspar, 110 Fed. 702; Osborne v. San Diego etc. Co., 178 U. S. 22, 20 Sup. Ct. Rep. 860, 44 L. Ed. 961; Wilson v. Perrault, 6 Idaho, 178, 54 Pac. 617; Salt River Co. v. Nelssen, 10 Ariz. 9, 85 Pac. 117, 12 L. R. A., N. S., 711, 16 Ann. Cas. 796; Hoover v. Deffenbaugh, 83 Neb. 476, 119 N. W. 1130. See Or. Stats. 911, c. 279, p. 483, sec. 7; Wash. Stats. 1911, c. 117, sec. 26.

3 Lanning v. Osborne, 76 Fed. 319; City of Pocatello v. Murray (Idaho), 173 Fed. 382; San Joaquin etc. Co. v. County of Stanislaus, 155 Cal. 21, 99 Pac. 365 (saying, "all, however, that a court of equity can decree is that the established rates are unreasonable and restrain their collection"). But see Salt River Co. v. Nelssen, 10 Ariz. 9, 85 Pac. 117, 12 L. R. A., N. S., 711, 16 Ann. Cas. 796, court seeming to fix a rate.

4 Stats. 1885, p. 95, sec. 5, as amd. in 1901.

5 Stats. 1901, p. 331.

6 Lassen Irr. Co. v. Long, 157 Cal. 94, 106 Pac. 409.

7 Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404.

8 With regard to the right of the company to demand payment in advance, see *supra*, secs. 1280, 1286.

9 *Infra*, c. 55.

(whether plentiful and accessible, or scarce, requiring an expensive system); whether water is sold alone or land and water together; whether basis of charge is area served or quantity of water delivered; whether installments are annual or otherwise; whether maintenance and operation charge is based upon area, shares of stock, or quantity of water; whether maintenance charge is fixed or variable; and many other things. Consequently rates in one locality do not indicate what would or would not be reasonable in another.

The usual method of creating new irrigation systems to-day is for the irrigation company to sell the land with a right to water supply attached, making a lump charge for the two, payable in ten annual installments. From lists below, it appears that a rough average of eighteen United States reclamation projects would give a charge of forty dollars per acre, together with one dollar per acre annually for maintenance and operation.[10] Six Wyoming Carey Act projects would average about thirty-one dollars and fifty cents per acre, and forty-six Idaho Carey Act projects about forty-two dollars per acre.[11] In some parts of Oregon land prices run from twenty-five dollars to one hundred dollars per acre and up, water-rights for the same being valued at fifty dollars to one hundred and fifty dollars per acre additional. As already said, however, there is not and cannot be uniformity in these matters, any more than one could give any average value for city lots in the various cities of the country.

In mutual (or co-operative) companies,[12] stock ownership entitles the consumer to a proportionate share of the supply-run; that is, his right is governed by quantity of water, not by acreage of land. In other kinds of organization some fix charges upon the amount of water used, while others fix them upon acreage irrigated. Fixing charge by acreage has the disadvantage of requiring the careful irrigator (using water economically) to pay as much per acre as his wasteful neighbor, and removes the incentive to be economical; while charging by quantity induces economy and also benefits the land by preventing over-irrigation; further, by the economical use, supplying a greater number.[13] In Idaho it is pro-

10 *Infra*, sec. 1399.

11 *Infra*, sec. 1384.

12 *Infra*, sec. 1266.

13 "The prevailing type of contract is one in which the company agrees to furnish a fixed quantity of water, which, however, must be used on a definite area, and subject to the further limitation that whenever there is not water enough to give to all their full contract quantities the available water shall be pro-rated. In

vided by statute that rates must be based upon quantity of water delivered, and not upon acreage irrigated.[14]

Annual cost of water delivery per acre on four typical canals (from four different States), figuring delivery to lateral only, averaged seven and one-half cents; annual cost of delivery per acre on thirteen typical canals (from five different States and Territories), including delivery to individuals, averaged forty-one and one-half cents.[15] Sometimes separate organizations are effected to control laterals after the water is received from the main canal.

Charge for maintenance is usually somewhere around one dollar per acre per year.

In addition to the land and water charges, it is usually said that the settler should have fifteen hundred dollars to three thousand dollars to build a house, clear the land, and maintain himself until the first crop can be actually produced and marketed.

(3d ed.)

§ 1289. **Same.**—Mr. Frank Adams, Irrigation Manager for California of the United States Department of Agriculture, says in a letter:

"A not uncommon price for a water-right in the citrus sections of the South is two hundred dollars per acre, although for much of the land water is available at a much lower price. A very large part of the water used in irrigation in the citrus orchards in Southern California is derived from private pumping plants.

"Very few irrigation companies in California now sell water-rights except as they are included with land. Where such rights are still sold their average cost in the central valley is from five dollars to ten dollars per acre.

"At one time it was customary for companies selling water for irrigation to make a flat charge per acre irrigated, although the modern tendency and the best practice is to charge for the actual

effect, these contracts provide that the farmer shall take what water he can get, for which he shall pay a flat rate per acre, regardless of the quantity received. . . . . A few companies deliver water on a quantity rate, with a fixed minimum charge, and it has been found that farmers securing water under such contracts use much less water than those paying a flat acreage rate—in two instances, where accurate measurements were made, the saving was more than twenty-five per cent." Report of U. S. Dept. of Agriculture for 1909, on the Duty of Water.

[14] Rev. Codes, sec. 3290; Laws 1899, p. 380, sec. 20.

[15] Bulletin 229, Office of Exp. Sta., p. 96, United States Department of Agriculture.

amount of water used. An average of the flat acre charge made by eleven companies now operating in San Joaquin and Sacramento valleys is one dollar and twenty-five cents per acre per year under gravity systems. The lowest charge in this average is sixty-two and one-half cents per acre,[16] and the highest two dollars and twenty-five cents per acre. Where a charge is made for the actual amount of water used the basis of charge is usually an acre-foot, a cubic foot per second running twenty-four hours, or a miner's inch running twenty-four hours. The lowest charge per acre-foot, of which we have record, is thirty-seven and one-half cents, and the highest, which is under an all-pumping system, is one dollar and a half. In the orchard sections of the Sierra foothills this sometimes reaches as high as six dollars. The lowest charge of which we have record where the unit is the cubic foot per second per twenty-four hours is seventy-five cents. The charge per twenty-four hour inch varies from three cents to fifty cents, depending upon the system and the season of the year, water often costing more in summer than in the spring and fall, and sometimes more during the daytime than during the night-time. Speaking generally, I should say that the charge per twenty-four hour inch seldom exceeds twenty-five cents, although such a charge is not uncommon. In connection with these charges it might be said that a cubic foot per second running twenty-four hours is the equivalent of two acre-feet, and that the usual California miner's inch is one-fiftieth of a cubic foot per second, although the statute inch in California is one-fortieth of one cubic foot per second."

(3d ed.)

§ 1290. **Miscellaneous Duties.**—The foregoing are the chief duties imposed by law upon those serving the public with water supply. But they are not the only duties, for the fundamental thing at which the law aims is reasonable service, and no particulars can be exhaustive.

Additional statutory duties, also, are sometimes (and hereafter will probably be more frequently) imposed. Thus, in Idaho, companies distributing water must get a permit from the State Engineer so to do,[17] and must make an annual report to the State.[18] By a Colorado statute, copied in several other States, the duty is

[16] Fixed by the board of supervisors of the county.—S. C. W.

[17] Laws 1909, c. 276, p. 335.

[18] Idaho Rev. Codes, sec. 2844.

imposed upon consumers not to *receive* (under penalty) from the distributor more water than he is entitled to.[19]

[19] Colo. Laws 1887, p. 312; Rev. Stats. 1908, sec. 3260; copied for example, in Cobbey's Ann. Neb. Stats., secs. 6808, 6809.

§§ *1291–1297. (Blank numbers.)*

CHAPTER 55.

PUBLIC REGULATION.

§ 1298. Public boards or commissions.
§ 1299. Basis of the power to fix rates.
§ 1300. The statutes.
§ 1301. Proceedings before the board.
§ 1302. Rates presumed valid when fixed by the board.
§ 1303. Jurisdiction of equity against improper action by the board.
§ 1303a. Same.
§ 1304. What is a fair return?
§ 1305. What is the value of the property?
§§ 1306–1314. (Blank numbers.)

(3d ed.)

§ 1298. **Public Boards or Commissions.**—The duties of public service thus laid down by the law are expressed mostly in general terms, as is shown by the frequent use of the word "reasonable" throughout. To carry them into more specific form and apply them to individual cases, public boards are frequently given power to see to their execution: chiefly to fix rates, but with power to secure reasonableness of regulations, adequate facilities, safe structures, etc. In the West, administrative officers to control diversion of waters from streams between companies have already been considered in Part VI above, but as a rule they have no control after the water leaves the stream; and the matter now in hand is the new "public service" system to control the distribution between each company and its consumers after the diversion from the stream has been made.

The very recent plan (original, I believe, with Governor Hughes of New York) consists in creation of a "State Public Service Commission" empowered to supervise all public services in the State, including railways, telegraph, telephone, water companies, gas companies, and so on. In 1911, California, Kansas, Nebraska, Nevada, Oregon and Washington adopted measures for the creation of such commissions, or else extended to the State Railway Commission similar powers over water companies.[1]

1 *California.*—Stats. 1911, c. 60, proposes (to be voted upon at the next election) an amendment to the State Constitution, article 12, section 23, giving to the Railroad Commission power over public utilities, including

Heretofore, the fixing of rates has been the chief activity upon these lines; and it is with that subject that the following chapter deals.

It should be said that the following chapter is built about some of the late cases, taking them as a nucleus to which other authorities are added, without assuming to give a complete investigation.

(3d ed.)

§ 1299. **Basis of the Power to Fix Rates.**—Since it is the duty of the distributor to furnish water upon tender of a reasonable rate, public commissions or boards are frequently, by statute, given power to specify the maximum beyond which rates would be unreasonable.

Statutes of a State to that end are constitutional.[1a] They rest upon the police power of the State,[2] under the principle of Munn v. Illinois,[3] that where one devotes his property to a public use, "he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created, ... so long as he maintains the use. . . . . When private property is devoted to public use, it is subject to public regulation." Although the present tendency is to carry public regulation to where public officers would be substituted in effect for the company's board of directors, yet in theory the public control extends properly only to the correction of abuses, and not to matters of business operation; to in-

water companies. The power is to be absolute, "unlimited by any provision of this constitution," although, of course, that would not remove the Federal constitution. See *supra*, secs. 422, 1198, regarding other newly greated California boards.

Kansas.—Stats. 1911, c. 238, p. 417.

Nebraska.—Stats. 1911, c. ——, Sen. Bill 328, gives the State Railway Board power to regulate rates of water-supply companies.

Nevada.—Stats. 1911, c. 162.

Oregon.—Stats. 1911, c. 279, p. 483.

Washington.—Stats. 1911, c. 117.

[1a] Spring Valley W. W. v. Schottler, 10 U. S. 347, 4 Sup. Ct. Rep. 48, 28 L. Ed. 173, Field, J., dissenting, on the ground that the beneficiary of a use (the public) cannot itself fix the charge it will pay; but the contrary is now well settled. County of San Francisco v. Spring Val. W. Co., 48 Cal. 493; Spring Valley W. W. v. San Francisco, 61 Cal. 3; Spring Valley Waterworks v. City of San Francisco, 82 Cal. 286, 16 Am. St. Rep. 116, 22 Pac. 910, 1046, 6 L. R. A. 756; San Diego W. Co. v. City of San Diego, 118 Cal. 556, 62 Am. St. Rep. 261, 50 Pac. 633, 38 L. R. A. 460; Santa Ana Water Co. v. Town of San Buena Ventura, 65 Fed. 323; Boise etc. Co. v. Boise City (Idaho), 123 Fed. 232, 59 C. C. A. 236; City of Denver v. Denver etc. Co., 41 Colo. 77, 91 Pac. 918; Spring Valley Co. v. San Francisco, 165 Fed. 676; Knoxville v. Knoxville W. Co., 212 U. S. 1, 29 Sup. Ct. Rep. 148, 53 L. Ed. 371.

[2] Spring Valley Co. v. San Francisco, 165 Fed. 676.

[3] 94 U. S. 113, 126, 24 L. Ed. 77.

terfere in cases of oppression, and not to take over the ordinary running of the property.

(3d ed.)

§ 1300. **The Statutes.**—In California the constitution, article 14, section 1, now provides that rates in cities and towns may be fixed by the board of supervisors or town council or other governing body, and shall continue in force for one year and no longer. Outside of cities and towns, the constitution leaves the manner of fixing rates to subsequent legislation; pursuant to which statutes have been passed giving boards of supervisors power to fix rates.[4] Outside of cities and towns, the corporation must furnish water at such rates as may be established in pursuance of law.[5] For irrigation the board of supervisors are required to fix the maximum rates at which water shall be supplied,[6] and so of other uses generally, outside of cities and towns,[7] which rates shall be binding and conclusive until changed by the board, which change shall not be made within one year.[8] Collection of rates in excess of those so fixed shall, both outside of cities[9] and within cities,[10] cause forfeiture of franchise and waterworks, and generally, as to uses outside cities and towns, the consumer may recover as damages the whole rate so collected, together with actual damages sustained, and costs of suit.[11]

In Colorado, the constitution provides: "The General Assembly shall provide by law that the board of county commissioners, in their respective counties, shall have power, when application is made to them by either party interested, to establish reasonable maximum rates to be charged for the use of water, whether furnished by individuals or corporations";[12] and pursuant thereto the county commissioners are empowered to fix rates, under a procedure prescribed by the legislature.[13] In Idaho, the constitution provides: "The legislature shall provide by law the manner in which reasonable maximum rates may be established to be charged for the use of water sold, rented, or distributed for any useful

4 Stats. 1880, p. 16; Stats. 1885, p. 95; 1897, p. 49; 1901, p. 80; 1901, p. 331. The California constitutional and statutory provisions are printed in full in section 1432, *infra*.

5 Civ. Code, sec. 552.

6 Stats. 1880, p. 16.

7 Stats. 1885, p. 95.

8 *Ibid.*

9 Stats. 1880, p. 16, sec. 2.

10 Const., art. 14, secs. 1, 2.

11 Stats. 1885, p. 95, sec. 10.

12 Art. 16, sec. 8.

13 Rev. Stats. 1908, sec. 3262 et seq.

or beneficial purpose"; [14] and pursuant thereto the county commissioners are empowered to fix rates, under a procedure prescribed by the legislature.[15] Similar provisions exist in other States, and, lately, Public Service Commissions are being established to take over these matters, as above noted.[16]

The acts of Congress concerning reservoir sites have usually expressly recognized this power of the State to fix rates.[17] For example, in one act it is provided: "That the charges for water coming in whole or part from reservoir sites used or occupied under the provisions of this act shall always be subject to the control and regulation of the respective States and Territories in which such reservoirs are in whole or part situate." [18]

Where the constitution prescribes that local boards shall fix rates, the legislature cannot itself fix a rate,[19] and a city cannot authorize a water company to fix its own rates.[20]

(3d ed.)

§ 1301. **Proceedings Before the Board.**—The county board usually does not fix the exact rate to be charged, or specify the time or conditions of payment, but only the maximum beyond which the company cannot go,[21] which statutory maximum may be changed by the legislature.[22] If one in public service grants "free" water-rights to some consumers, the existence of such "free" rights cannot be used by the company as an argument in fixing rates upon paying consumers.[23]

A company will not be heard to complain of too low a rate until it has exhausted its remedies before the board of supervisors itself.[23a] Under the California statute it must show *(semble)* that it appeared before the board and presented its case at the time rates were fixed, and also, if it delays suit for a year after the

[14] Art. 15, sec. 6.

[15] Rev. Codes, sec. 3294 et seq. The constitutional provision has been held to prevent the legislature from itself fixing a rate. Wilson v. Perrault, 6 Idaho, 178, 54 Pac. 617. Concerning rates in cities and towns, see Stats. 1907, p. 556.

[16] *Supra*, sec. 1298.

[17] Citations *supra*, sec. 176.

[18] A. C. Feb. 26, 1897, 29 Stats. 599, c. 335.

[19] Wilson v. Perrault, 6 Idaho, 178, 54 Pac. 617.

[20] Brummitt v. Ogden etc. Co., 33 Utah, 289, 93 Pac. 828.

[21] Wheeler v. Northern Irr. Co., 10 Colo. 593, 3 Am. St. Rep. 603, 17 Pac. 487.

[22] Stanislaus County v. San Joaquin, Co., 192 U. S. 201, 24 Sup. Ct. Rep. 241, 48 L. Ed. 406.

[23] Nampa etc. Irr. Dist. v. Gess (1910), 17 Idaho, 552, 106 Pac. 993. See, also, Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404.

[23a] Northern etc. Co. v. Pouppirt, 47 Colo. 490, 108 Pac. 23, holding rates not open to collateral attack.

rates were fixed, that it applied to the board for a revision of them.[24] The statute does not allow such revision within the year, and hence if suit is brought within the year, this is not necessary; but after the expiration of the year, the matter cannot be raised in court without first applying for a re-examination before the board of supervisors.[25] In proceedings before the board outside of cities and towns, petition and notice are provided for,[1] but it seems that notice to the company is not necessary within cities and towns.[2] If the rate is not in itself improper, it would seem that the conduct of the board of supervisors and their method of arriving at it are immaterial.[3]

(3d ed.)

§ 1302. Rates Presumed Valid, When Fixed by the Board.—The fixing of rates by public officials is a *quasi* judicial function to the extent that they are "bound in morals and in law to exercise an honest judgment as to all matters submitted to their official determination";[4] but considered generally, it is primarily legislative. "The completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power."[5] The regulation is hence statutory in its nature, and will, like statutes, be presumed valid in the courts until the contrary is clearly shown.[6] As was said in Knoxville v. Knoxville Water Co., *supra,* the judicial power of annulling legislation on

[24] San Joaquin etc. Co. v. County of Stanislaus, 155 Cal. 21, 99 Pac. 365; San Diego etc. Co. v. Jasper, 189 U. S. 441, 23 Sup. Ct. Rep. 571, 47 L. Ed. 892.

[25] *Ibid.*

[1] Stats. 1885, p. 95.

[2] Spring Valley W. W. v. City of San Francisco, 82 Cal. 286, 16 Am. St. Rep. 116, 22 Pac. 910, 1046, 6 L. R. A. 756; San Diego Co. v. City of National City, 74 Fed. 81.

[3] "If, on the whole, the result is reasonable, and complainant receives a just income, it certainly has no grievance and no cause of action," and "this is so even though it be shown that the board in its proceedings violated every rule in the law of evidence." Spring Valley Co. v. San Francisco, 165 Fed. 682. See, also, Contra Costa W. Co. v. Oakland (Cal. 1911), 113 Pac. 668 (where the board lowered the rate twenty-five per cent from the previous year); San Diego etc. Co. v. National City, 174 U. S. 739, 760, 19 Sup. Ct. Rep. 804, 43 L. Ed. 1154; San Diego etc. Co. v. Jasper, 110 Fed. 702, 174 U. S. 754; Spring Valley W. W. v. Schottler, 110 U. S. 347.

[4] Spring Valley W. W. v. Schottler, 110 U. S. 354, 4 Sup. Ct. Rep. 48, 28 L. Ed. 173.

[5] Knoxville v. Knoxville W. Co., 212 U. S. 1, 29 Sup. Ct. Rep. 148, 53 L. Ed. 371. See, also, San Diego W. Co. v. San Diego, 118 Cal. 556, 50 Pac. 633, 38 L. R. A. 460.

[6] San Diego Co. v. City of National City, 74 Fed. 83; Contra Costa W. Co. v. City of Oakland (Cal. 1911), 113 Pac. 668; Spring Valley W. W. v. San Francisco, 82 Cal. 306, 16 Am. St. Rep. 116, 22 Pac. 910, 1046, 6 L. R. A. 756 (*dictum*).

this ground "ought to be exercised only in the clearest cases." In San Diego Land & Town Co. v. National City,[7] the United States supreme court said: "Judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulation as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for public use." In Munn v. Illinois,[8] the same court said, as has repeatedly since been said: "Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained."

(3d ed.)

§ 1303. Jurisdiction of Equity Against Improper Action by the Board.—The ground upon which a court of equity may relieve the company by injunction against rates fixed by the public officials (aside from cases of actual fraud) is that, being in the nature of a statute, it is unconstitutional when it denies to the company's property devoted to public use a just compensation, or deprives it of its property without due process of law; that is, that the rate is confiscatory.[9] The courts will interfere where the line is passed which separates regulation from spoliation. "That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint."[10] Such restraint is placed in the constitutional provisions for the benefit of everyone, that no person shall be deprived of life, liberty or property without due process of law, and that private property shall not be taken for public use without just compensation.[11] Although the pending California constitutional amendment[12] proposes to take these out of the State constitution, yet their substance is in the Federal constitution; and, at all events, they have applied to the subject up to the present time Officials taking property in disregard of them are trespassers, liable to injunction like other trespassers.

The line which separates regulation from spoliation is, however, a difficult one to draw. Regulation is intended only to prevent

[7] 174 U. S. 754, 19 Sup. Ct. Rep. 804, 43 L. Ed. 1154.

[8] 98 U. S. 113, 24 L. Ed. 77.

[9] Properly speaking, the court does not *annul* a rate; it enjoins its enforcement, equity acting *in personam*.

[10] Justice Story in Wilkerson v. Leland, 2 Pet. 657.

[11] *Supra*, secs. 604, 605.

[12] *Supra*, sec. 1298, note.

unreasonable rates; hence the basis of rate-fixing, in the first instance, is not to avoid confiscation, but to allow the company the highest rate consistent with reasonableness to the public, or, as a California statute says: "Rates shall be equal, reasonable and just, both to such persons, companies, associations and corporations, and to said inhabitants."[13] However, although that is the principle that should guide the commissioners, yet when the company comes into court, the action of the board will be presumed to have been properly based upon that principle, under the presumption already set forth that its legislative acts are constitutional; the court only considers whether the board so *excessively* departed from its duty as to result in confiscation. It is a difference in degree. The lowest rate the court will allow is usually the highest one the board will fix, however reasonable a higher rate would have been; but in the absence of fraud or such excessively low rate as to obviously deny just compensation for property devoted to public use, the courts hold that they cannot revise the discretionary legislative functions of the board. To this extent the company is in the hands of the public officials, just as is a private citizen to whom legislation frequently works a hardship without being unconstitutional. It is, to that extent, *damnum absque injuria*. The courts have taken the stand that they can interfere only in extreme cases.

There is confusion in the reports as to the difference between the words "unfair," "unjust," "unreasonable," "confiscatory," which, while colloquially and in general conversation used usually as synonymous, have yet shades of ascending strength in the order named which are urged with insistence where millions are involved. The words have not, as yet, taken definite technical meaning in the reports. For example,[14] the expressions are used, "the court is limited to the determination of a single question, namely, Is the ordinance *confiscatory?*" and "This case comes here on one vital issue: Are the water rates *confiscatory?* To this all other questions involved are mere incidents"; while again[15] saying that anything less than *"reasonable"* is *per se* confiscatory, and "the court has the power to decide whether such rates are *reasonable"* and to enjoin their enforcement if *"unreasonable."*[16] In

13 Stats. 1885, p. 95.

14 Spring Valley W. Co. v. City and County of San Francisco, 165 Fed. 679 et seq.

15 Page 678.

16 This case further says (page 677) that in 1867 (Peik v. Chicago etc. Co., 94 U. S. 164, 94 L. Ed. 97), it had

this way the words are used interchangeably; and yet there seems a proper ground for distinction. The test before the rate-fixing board in the first instance is that the rates be reasonable. If the test were the same when their action is questioned in court, it would be substituting the discretion of the court for that of the commissioners, while the legislature has addressed itself in that to the commissioners, not to the courts. It is like a case of negligence on appeal. It is for the jury to say whether reasonable care was used, and the appellate court cannot reverse the case because it disagrees with the jury's conclusion upon that point, but only if the jury's conclusion is so devoid of foundation as to be obviously improper. So likewise the courts now rule that it is for the board to say whether the rates it fixes are reasonable, and for equity to interfere only where the rates which the board allows are *so* low that the conclusion of the board that they are reasonable is obviously devoid of truth (however well meant). It is a question of degree, and in the latter case the rates could well be called confiscatory, and be substantially distinguished from not being "reasonable," even though this leaves "a twilight zone of injustice within which the public officials may roam." The courts cannot revise the discretionary functions of the rate-fixing authorities, and only act when the latter obviously abuse their discretion.

(3d ed.)

§ 1303a. **Same.**—The supreme court of the United States holds that the company has the burden of proof, and must show that the rates are confiscatory beyond any just or fair doubt, and if there is any doubt, courts should delay action until the rate has been tested by experience.[16a] In a late case the supreme court of California

been held that courts have no power to interfere at all; that later such power was recognized, but only where the rates allowed no compensation at all, however small; that later still, the field for interference was enlarged to where the lowness of rate was such as to show fraud; that at the present day, the test was whether the rates are "unreasonable"; and at the same time, as above quoted, that the sole question to-day is whether the rates are "confiscatory." In San Diego W. Co. v. San Diego, 118 Cal. 556, 50 Pac. 633, 38 L. R. A. 460, Beatty, C. J., concurring, said that anything short of a just and reasonable compensation is *per se* confiscatory.

[16a] Willcox v. Consolidated Gas Co., 212 U. S. 19, 54, 29 Sup. Ct. Rep. 192, 53 L. Ed. 382; Knoxville v. Knoxville W. Co., 212 U. S. 1, 29 Sup. Ct. Rep. 148, 53 L. Ed. 371. Compare, however, the following: Where the case is a difficult one, a preliminary injunction is held proper though the ultimate validity of the rate be merely doubtful (San Joaquin etc. Co. v. County of Stanislaus, 163 Fed. 567), and the plaintiff may be ordered to give a bond to refund the excess if the rate be finally held lawful (Contra Costa W. Co. v. City of Oakland, 165 Fed. 518), or the excess may be impounded and ordered paid into court until the final decision is reached. (Spring Valley Co. v. San Francisco, 165 Fed. 667.)

holds that whether the rate is confiscatory is a question of fact (not of law) of which the company has the burden of proof, and which, in the case before the court, it was held not to have sustained; and that the test of being confiscatory is whether the rate allows "less than the lowest" rate of return which the city council might fairly have determined to be just, or "less than the lowest" profit upon kindred enterprises in the locality, or "less than the lowest" profit which could possibly be held reasonable. It was further held that "the court is not to act upon what it, as an original question, might think to be fair and reasonable, but is, rather, to determine what is the *lowest* percentage which could properly be thought by the rate-fixing body to be fair and reasonable. On this question, there must be a certain range of discretion which may be traversed by the city council without infringing upon constitutional rights. If the ordinance gives a rate of return which, although low, is not palpably unreasonable, the court is not to upset the action of the council because it may think a higher rate more appropriate." [17]

The test before a court of equity is not, on the one hand, whether the rates are unprofitable, though that is a strong circumstance to be considered,[17a] nor, on the other, whether the rate is so low as to show fraud,[18] but whether the rate is obviously (with all presumptions in favor of the rate) so low as to deprive the company of a fair return on the value of its property, " and thus, in substance and effect, of the property itself." [19] Where, however, the rate clearly amounts to confiscation of the distributor's property, the courts will enjoin its enforcement, and a State statute denying the right to seek relief in court is unconstitutional.[20]

Whether confiscation exists depends upon whether the rate allows a fair return upon the value of the property. This in turn

[17] Contra Costa Co. v. City of Oakland (Cal. 1911), 113 Pac. 668.

[17a] Regan v. Trust Co., 154 U. S. 362, 14 Sup. Ct. Rep. 1047, 38 L. Ed. 1014; Board v. Montezuma W. Co. (1907), 39 Colo. 167, 89 Pac. 50.

[18] But see Spring Valley W. W. v. San Francisco, 82 Cal. 306, 16 Am. St. Rep. 116, 22 Pac. 910, 1046, 6 L. R. A. 756.

[19] Chicago etc. Co. v. Minnesota, 134 U. S. 418, 458, 10 Sup. Ct. Rep. 462, 33 L. Ed. 970; accord, San Diego Co. v. City of National City, 74 Fed. 81; Contra Costa Water Co. v. City of Oakland, 165 Fed. 518; San Joaquin etc. Co. v. County of Stanislaus, 163 Fed. 567; Spring Valley Co. v. San Francisco, 165 Fed. 667; Knoxville v. Knoxville W. Co., 212 U. S. 1, 29 Sup. Ct. Rep. 148, 53 L. Ed. 371.

[20] Ex parte Young, 209 U. S. 123, 28 Sup. Ct. Rep. 441, 52 L. Ed. 714, 13 L. R. A., N. S., 932, 14 Ann. Cas. 764, further holding that whether rates violate the fourteenth amendment of the constitution of the United States is a federal question giving the United States circuit court jurisdiction. But cf. Seattle Elec. Co. v. Seattle R. etc. Co., 185 Fed. 365.

involves two questions: First, what is a fair return? And second, what is the value of the property? "We now come to the pivotal issues of this controversy. First, what is the probable reasonable rate of income for the property used in supplying San Francisco with water? Second, what is the probable reasonable value of such property?" [21]

(3d ed.)

§ 1304. **What is a Fair Return?**—The first question is, What is a fair return? Outside of cities and towns it is provided by statute in California that the return must be not less than six nor more than eighteen per cent upon the value of the property,[22] and accordingly a rate allowing a return of only three and sixty-seven hundredths per cent has been held unlawfully low and enjoined.[23] No such statutory guide is provided within cities and towns, and as to that five per cent has been held proper [24] and four and three-hundredths per cent too low,[25] and also four and four-tenths per cent too low.[1] The California supreme court said a return of two and eight-tenths per cent would be too low, and left three and one-half per cent an open question, but five and sixty-eight hundredths per cent would not be too low, and even four and five-tenths per cent "certainly would be a very substantial net return, considerably more than is derived from many investments eagerly sought by capital." Upon rehearing this was modified to mean that it was not too low upon the facts presented, but not to mean to lay down such a rate as sufficient in all cases.[2] Six per cent is held not too low.[3]

21 Spring Valley W. Co. v. San Francisco, 164 Fed. 684. "What the company was entitled to demand in order that it might have just compensation was a fair return upon the reasonable value of the property at the time it was being used for the public." Stanislaus County v. San Joaquin etc. Co., 192 U. S. 201, 24 Sup. Ct. Rep. 241, 48 L. Ed. 406; Willcox v. Consolidated Gas Co., 212 U. S. 19, 29 Sup. Ct. Rep. 192, 53 L. Ed. 382. "In the effort to determine whether a given rate is or is not confiscatory, two elements must necessarily be inquired into. First, the court must ascertain the value of the property upon which the plaintiff is entitled to seek a return, and, second, it must determine what is the percentage of return to which the plaintiff is entitled upon such value." Contra Costa W. Co. v. City of Oakland (Cal. 1911), 113 Pac. 668.

22 Cal. Stats. 1885, p. 95.

23 San Joaquin etc. Co. v. County of Stanislaus, 163 Fed. 567.

24 Spring Valley Co. v. San Francisco, 165 Fed. 667.

25 Spring Valley W. W. v. San Francisco, 124 Fed. 574.

1 Spring Valley W. Co. v. San Francisco, 164 Fed. 657.

2 Contra Costa W. Co. v. City of Oakland (1911), 113 Pac. 668.

3 Stanislaus County v. San Joaquin Co., 192 U. S. 201, 24 Sup. Ct. Rep. 241, 48 L. Ed. 406; Willcox v. Consolidated Gas Co., 212 U. S. 19, 50, 29 Sup. Ct. Rep. 192, 53 L. Ed. 382.

Where a company furnishes water to more than one county, the rate, it is held, must be fixed in each county to give an adequate return on the property within it, and is not to be based on the collective value of the company's property in all the counties. For example, when a canal runs through three counties and the loss by seepage and evaporation amounts to twelve per cent in the first county, thirty-three per cent in the second, and fifty-three per cent in the third, the third, which is farthest from the headworks, is not entitled to fix a lower rate than the others; and if the rate of one dollar and sixty-five cents fixed for the second county is reasonable and just, it was held that the rate of one dollar and fifty cents fixed for the third is unreasonable and unjust.[4] In another case between the same parties, in 1896, rates were fixed in Stanislaus county under the act of 1885, and remained unchanged. In 1904, two neighboring counties, Fresno and Merced, which the same company supplied, now lowered rates also. The company contended that while it could stand the low Stanislaus rate in one county alone with higher rates in the others, yet it could not stand the rates taken together as now fixed by all three counties. It was held that the company's contention amounts to an admission that the latter two county rates are proper, but only that the Stanislaus rate is improper, and as to them, it has delayed too long for an injunction, nor can it ask an injunction in any event without having first exhausted its legal remedies by application to the boards of supervisors to reduce the rates voluntarily, as the statute allows.[5]

The fact that interest rates generally have advanced within a short time does not necessarily entitle a water company to earn a higher rate of income than before without a corresponding adjustment of the value of its property.[6] The risk of the business or of the locality, and rates current there in similar enterprises, are to be considered.[7] The fairness of the return is to be measured in the aggregate, not by the validity of the rate as concerns each consumer.[8]

[4] San Joaquin etc. Co. v. County of Stanislaus, 163 Fed. 567; but cf. Niday v. Barker, 16 Idaho, 73, 101 Pac. 254.

[5] San Joaquin etc. Co. v. County of Stanislaus (1908), 155 Cal. 21, 99 Pac. 365.

[6] Spring Valley Water Co. v. City and County of San Francisco, 165 Fed. 667.

[7] Willcox v. Consolidated Gas Co., 212 U. S. 19, 52, 29 Sup. Ct. Rep. 192, 53 L. Ed. 382.

[8] *Ibid.*

The law upon the question of what is a fair return is as yet in course of development.

(3d ed.)

§ 1305. **What is the Value of the Property?**—The second question, and, naturally, in the case of large plants, a very difficult one, is: What is the value of the property upon which the return is to be figured? Strictly speaking, it would appear that a great water plant has no fixed value; for value can be measured only by some standard accepted by custom, such as an open market, or what a thing brings on a sale, which is its price, or value measured in gold. Great distributing plants are so rarely sold that there is no such standard of measurement. There is no open market for such things.[9]

The only way of figuring in money the value of a thing having no sale market, and in its nature fixed and permanently bound in with its surroundings, is upon the money return which it brings in, comparing that return with the return received from things which do have a market value; that is, the measurable value of such a plant lies in the rates it can collect, and to attempt to fix rates upon its value (which depends upon the rates) is hence proceeding to a considerable degree in a circle. The result is that the determination of a value on which to figure the return must be more or less arbitrary. It becomes considerably a matter of establishing some empirical formula by experiment.[10]

This formula is now being slowly worked out.

Some elements that have been said to enter into it are as follows: The cost of reproduction, less depreciation that has already occurred from use and age;[11] annual operating expenses, interest on debt properly incurred, reasonable dividend on stock actually paid up, and annual depreciation;[12] managing and oper-

[9] Value of plant must always be more or less in doubt. Willcox v. Consolidated Gas Co., 212 U. S. 19, 50, 29 Sup. Ct. Rep. 192, 53 L. Ed. 382.

[10] "Each case must depend very largely upon its own special facts, and every element and every circumstance which increases or depreciates the value of the property, or of the service rendered, should be given due consideration, and allowed that weight to which it is entitled. It is, after all, very much a question of sound and well-instructed judgment." Mr. Justice Farrington in Spring Valley W. Co. v. San Francisco, 165 Fed. 667. In Oregon and Washington the public service commission is directed to ascertain the value of the property. Or. Stats. 1911, c. 279, p. 483, sec. 9 et seq.; Wash. Stats. 1911, c. 117.

[11] Knoxville v. Knoxville W. Co., 212 U. S. 1, 29 Sup. Ct. Rep. 149, 53 L. Ed. 371.

[12] Contra Costa W. Co. v. City of Oakland, 165 Fed. 518.

ating expenses, taxes, current repairs, maintenance and repair;[13] market value of its outstanding stocks and bonds;[14] value attributable to the plant being a going concern;[15] the value of any franchise held by the company if such franchises have a distinctive productive value of their own;[16] cost of plant, cost of annual operation at a fair profit;[17] allowance to meet annual depreciation in the future[18] (allowance for depreciation being only for the future, since past depreciation is, on the contrary, to be deducted).[19]

Some elements that have been said *not* to enter (or only partly to enter) into the formula are as follows: The original cost or amount of capital invested;[20] nor the purchase price of works when bought from an old company three years before;[21] nor the financial

[13] San Diego Co. v. City of National City, 74 Fed. 81; San Diego etc. Co. v. Jasper, 189 U. S. 442, 23 Sup. Ct. Rep. 571, 47 L. Ed. 892; County of Stanislaus v. San Joaquin etc. Co., 192 U. S. 201, 24 Sup. Ct. Rep. 241, 48 L. Ed. 406; Contra Costa Co. v. Oakland (Cal. 1911), 113 Pac. 668; Cal. Stats. 1885, p. 95, sec. 4.

[14] Spring Valley Co. v. San Francisco, 165 Fed. 667.

[15] Omaha v. Omaha W. Co., 218 U. S. 180, 30 Sup. Ct. Rep. 615, 54 L. Ed. 991; Spring Valley W. Co. v. San Francisco, 165 Fed. 667, citing National Waterworks Co. v. Kansas City, 62 Fed. 853, 865, 10 C. C. A. 653, 27 L. R. A. 827; Spring Valley W. W. v. San Francisco (C. C.), 124 Fed. 574, 595.

[16] Spring Valley Co. v. San Francisco, 165 Fed. 667, 693; Willcox v. Consolidated Gas Co., 212 U. S. 19, 50, 29 Sup. Ct. Rep. 192, 53 L. Ed. 382.

[17] Stanislaus County v. San Joaquin etc. Co., 192 U. S. 201, 24 Sup. Ct. Rep. 241, 48 L. Ed. 406.

[18] Concerning allowance for annual depreciation, see San Joaquin etc. Co. v. County of Stanislaus, 163 Fed. 567; Knoxville v. Knoxville W. Co., 212 U. S. 1, 29 Sup. Ct. Rep. 149, 53 L. Ed. 371, saying: "It is not easy to fix at any given time the amount of depreciation of a plant whose component parts are of different ages with different expectations of life. But it is clear that some substantial allowance for depreciation ought to have been made in this case." And elsewhere in the same case: "The company is not bound to see its property gradually waste, without making provision out of earnings for its replacement. It is entitled to see that from earnings the value of the property invested is kept unimpaired, so that, at the end of any given term of years the original investment remains as it was in the beginning." In Spring Valley W. Co. v. San Francisco, 165 Fed. 667, it is held: "An ordinance fixing the compensation for perishable property devoted to public use which fails to make any provision for physical depreciation of such property, and to keep the original capital intact, is unjust to the owner. It has been held repeatedly that in fixing rates the depreciation of the plant from natural causes resulting from use should be taken into consideration." Citing cases, *inter alia;* San Diego L. & T. Co. v. Jasper, 189 U. S. 439, 442, 23 Sup. Ct. Rep. 571, 47 L. Ed. 892; San Diego L. & T. Co. v. National City (C. C.), 74 Fed. 79; Spring Valley Waterworks v. San Francisco (C. C.), 124 Fed. 574, 599; San Diego Water Co. v. San Diego (dissenting opinion by Chief Justice Beatty), 118 Cal. 557, 588, 62 Am. St. Rep. 261, 50 Pac. 633, 38 L. R. A. 460; Beale v. Wyman on Railroad Rate Regulation, sec. 430.

[19] *Ibid.*

[20] San Joaquin etc. Co. v. County of Stanislaus, 163 Fed. 567; Ames v. Union Pac. Ry., 64 Fed. 165.

[21] Contra Costa W. Co. v. Oakland (Cal. 1911), 113 Pac. 668.

loss of the same company in other counties or other cities in which the company also operates;[22] nor the rate of interest it actually pays on its bonds;[23] nor the amount of its outstanding shares of stock;[24] nor the cost of extensions, enlargements or other permanent improvements not yet actually accomplished;[25] nor cost of replacing property destroyed through its own fault or negligence;[1] nor, on a preliminary injunction, the value of the company's water-rights in the stream;[2] nor, where the company has a virtual monopoly, the "goodwill";[3] nor property which is more valuable for other purposes, such as the value of watershed lands near cities, if used for town lots;[4] nor, to any great extent, the cost of a substitute system.[5]

The question what is a fair return, as the minimum to which a distributor is entitled, and the question how the value of its property, upon which the return is to be figured, shall be reached, are difficult and involved questions of economics and politics as much as law. The matter is to-day in an experimental stage. One thing, however, seems fairly on the way toward settlement; that is, although some publicists urge solely "physical valuation," and there are some decisions close to that line,[6] yet the courts gen-

22 San Diego Co. v. City of National City, 74 Fed. 79.

23 *Ibid. Sed qu.*

24 Knoxville v. Knoxville W. Co., 212 U. S. 1, 29 Sup. Ct. Rep. 419, 53 L. Ed. 371.

25 Cal. Stats. 1885, p. 95.

1 Spring Valley Co. v. San Francisco, 165 Fed. 667.

2 "The right of the water company to divert water from the river is undoubtedly of value, but it may not be a value upon which ultimately complainant may be given a return under the law, and is therefore not made a part of the valuation of its property for the purpose of the application for a preliminary injunction, but is reserved for future consideration." Headnote to San Joaquin etc. Co. v. County of Stanislaus (1908), 163 Fed. 567.

3 The supreme court of the United States said in Willcox v. Consolidated Gas Co., 212 U. S. 19, 29 Sup. Ct. Rep. 192, 53 L. Ed. 382: "We are of the opinion that it is not a case for a valuation of 'goodwill.' . . . . The complainant has a monopoly in fact, and a consumer must take gas from it or go without. He will resort to the 'old stand,' because he cannot get gas anywhere else. The court below excluded that item, and we concur in that action."

4 Spring Valley W. Co. v. San Francisco, 165 Fed. 698 (citing Capital City Gaslight Co. v. Des Moines (C. C.), 72 Fed. 829, 844; Boise City I. & L. Co. v. Clark, 131 Fed. 415, 65 C. C. A. 399; Cons. Gas Co. v. New York (C. C.), 157 Fed. 849, 854; Beale & Wyman on Railroad Rate Regulation, secs. 343, 344, 462).

5 Spring Valley W. Co. v. San Francisco, 165 Fed. 667, 691. But see Water Dist. v. Water Co., 99 Me. 371, 387, 59 Atl. 537.

6 For example, a late California case holds that in reaching the "present reasonable value," "goodwill" is not an element, nor (*semble*) is the consideration of being a "going concern"; nor probable appreciation in value, nor the skill and good management in the upbuilding of the works, nor the obstacles and difficulties encountered in the construction of the works, nor the unusual natural advantages presented by the source of water supply,

erally, and the supreme court of the United States particularly, hold that there must be considered every element of value, physical or not, and intangible as well as tangible. A late case in the supreme court of the United States declares that the value is not limited to "the bare bones of the plant, its physical properties, such as its lands, its machinery, its water-pipes or settling reservoirs, nor to what it would take to reproduce each of its physical features. The value, in equity and justice, must include whatever is contributed by the fact of the connection of the items making up a complete and operating plant. The difference between a dead plant and a live one is a real value, and is independent of any franchise to go on, or any mere goodwill as between such a plant and its customers."[7]

nor the fact that the system of plaintiff had been thoroughly tried and proved equal to all demands, nor the prospective value of the property, nor the fact that plaintiff was carrying on its business in the exercise of a franchise emanating from the State, nor the risks of the business, nor the cost of reproducing the plant, nor the price paid three years before in purchasing the plant from an old company. The result came close to "physical valuation" of tangible assets only. Contra Costa W. Co. v. City of Oakland (Cal. 1911), 113 Pac. 668.

[7] City of Omaha v. Omaha W. Co. (1910), 218 U. S. 180, 30 Sup. Ct. Rep. 615, 54 L. Ed. 991, a case of a city buying a company's system, and not of rate-fixing; but the principle is the same. See Spring Valley Co. v. San Francisco, 165 Fed. 667; San Diego Co. v. City of National City, 74 Fed. 81; Ames v. Railway, 64 Fed. 165; Willcox v. Consol. Gas Co., 212 U. S. 19, 52, 29 Sup. Ct. Rep. 192, 53 L. Ed. 382 (holding, also, that the value is to be determined as of the time when inquiry is made regarding the rates).

§§ *1306–1314 (Blank numbers.)*

CHAPTER 56.

RIGHTS OF CONSUMERS FROM DISTRIBUTORS BASED UPON CONTRACT.

A. VALIDITY OF CONTRACTS GENERALLY.

§ 1315. The practical situation.
§ 1316. Contracts not *per se* invalid.
§ 1317. But contract provisions that are unreasonable or conflict with the distributor's public duties are invalid.
§ 1318. Same.

B. RATE CONTRACTS.

§ 1319. Contracts fixing rates in the absence of public rate-fixing.
§ 1320. Effect of transfer of water system upon contract rates.
§ 1321. Effect of public rate-fixing upon contract rate-fixing.
§ 1322. Contracts between companies and cities.
§ 1323. Contracts by the United States under the policy of conservation.

C. CONTRACTS AS GRANTING ESTATES.

§ 1324. Whether contracts do or can grant "easements" or "water-rights" to consumers, or only service rights.
§ 1325. The present California rule—Leavitt v. Lassen Irr. Co.
§ 1326. Whether charge can be made for a "water-right" in addition to the rates.
§ 1327. Comments.

D. CONTRACTS ARE CONCURRENT ONLY.

§ 1328. Contract rights, when valid, are but concurrent with the noncontract rights.
§§ 1329–1337. (Blank numbers.)

A. VALIDITY OF CONTRACTS GENERALLY.

(3d ed.)

§ **1315. The Practical Situation.**—In California, in earlier days, "since before the State was organized as a government,"[1] the distribution of water was left, under the doctrine of "*laissez faire*" prevailing throughout the country in business matters, to such conditions and stipulations as to quantity and manner of service and rates as the distributor's contracts called for. And still, at the present day, this remains (whatever the law may be)

[1] Fresno etc. Co. v. Park, 129 Cal. 441, 62 Pac. 87. See, also, reporter's statement in Titcomb v. Kirk, 51 Cal. 288.

the prevailing practice. Throughout the West, distribution of water for irrigation is, in practice, governed mainly by contracts between distributor and consumer.

But the rules just considered sometimes come in conflict with the terms of contracts, and it is coming to be regarded that while contracts are valid so long as their terms are not against the essential duties of public service set forth in a previous chapter, yet that these duties cannot be displaced, and that when contracts conflict with them, they must prevail over the contract.

There has been confusion upon the matter, because the subject is a new one, just developing. The Colorado law, to strengthen the consumer, turned aside to what appears to be "public ownership."[2] In California, the decisions were inconsistent, some recognizing no restrictions upon the validity of contract, of which Fresno Co. v. Park[3] was the leader; others insisting upon the foregoing law of public service, of which Crow v. San Joaquin Co.[4] was the leader. At the present writing the latter has prevailed, as represented by the case of Leavitt v. Lassen Irr. Co.,[5] taking the intermediate ground between unrestricted contract on the one hand and public ownership on the other, and upholding the law of public control (without public ownership), which recognizes the validity of contracts, but subordinates them to public control.

(3d ed.)

§ 1316. **Contracts not Per Se Invalid.**—There is a valid field for contracts in providing reasonable rates, rules, regulations and stipulations, which the company has the power to make (in the absence of conflict with statute). Within the field of reasonableness, terms may be such as the parties will agree upon; for so long as there is no unreasonableness to the consumer and no discrimination, the public generally are not taken at a disadvantage. The basis of public control is not to run the works by public officials, but only to prevent extremes. Consequently, for a public service company to make a contract with a private party is not *per se* a violation of the public service duties.

In the Park case the binding force of contracts had been laid down in very wide terms,[6] and this was followed in numerous cases,

2 *Infra*, next chapter.
3 129 Cal. 437, 62 Pac. 87.
4 130 Cal. 309, 62 Pac. 562, 1058.
5 157 Cal. 82, 106 Pac. 404.
6 In that case, Mr. Justice McFarland said that the constitutional convention, in the provisions concerning the use of water "had particularly in

and taken as the law to its fullest extent,[7] and is sometimes laid down by statute.[8]

(3d ed.)

§ 1317. But Contract Provisions That are Unreasonable or Conflict With the Public Duties of the Distributor are Invalid.—This unrestricted freedom of contract declared in the Park case (and sometimes in statutes) overlooked the fact that a public service company stands in a different position from a private individual. In the circuit court of the United States for the Southern

view the furnishing of water within municipalities, and determined that it would itself handle and legislate upon that branch of the subject so far as to leave little, if any, power to the legislature in the premises. But nothing of the kind appears in the constitution about water-rights and ditches existing and running through mining and agricultural districts, etc., outside of municipalities. As to this latter class of property with respect to which private contracts for compensation for the use of water has been the rule, and apparently has been satisfactory to both purchasers and consumers, the convention apprehending that there might come evils outside of municipalities somewhat similar to those feared within them, took the precaution of declaring, so that such would be the law beyond question, that the use of water appropriated for distribution and sale should be a public use, and subject to the regulation and control of the State. But it left to the legislature the power and discretion of regulating the sale of water outside of municipalities if the time should come when, in its wisdom, it thought such regulation was called for —or to allow the people to continue to freely contract on the subject as they had been accustomed continuously to do since before the State was organized as a government. . . . . Our conclusion is that the contract involved in the case at bar is not made invalid by the provision of the constitution invoked by appellants." Fresno Canal Co. v. Park, 129 Cal. 441, 62 Pac. 87.

[7] San Diego etc. Co. v. Souther, 90 Fed. 164, 104 Fed. 706, 44 C. C. A. 143, quoted *infra*, sec. 665; Stanislaus W. Co. v. Bachman (1908), 152 Cal. 716, 93 Pac. 858, 15 L. R. A., N. S., 359. See, also, Fresno Canal Co. v. Rowell, 80 Cal. 116, 13 Am. Rep. 112, 22 Pac. 53; Fresno Canal Co. v. Dunbar, 80 Cal. 530, 22 Pac. 275; Fresno Canal Co. v. Hart, 152 Cal. 450, 92 Pac. 1010; Souther v. San Diego Flume Co., 112 Fed. 229, 230; San Diego etc. Co. v. Jasper, 189 U. S. 445, 23 Sup. Ct. Rep. 571, 47 L. Ed. 892; San Diego etc. Co. v. Jasper, 110 Fed. 706, 708; Boise etc. Co. v. Turner (Idaho), 176 Fed. 373; Clague v. Tri-State Co. (1909), 84 Neb. 499, 133 Am. St. Rep. 637, 121 N. W. 570; Colorado etc. Co. v. McFarland (Tex. Civ. App.), 94 S. W. 400; Same v. Same, 50 Tex. Civ. App. 92, 109 S. W. 435; Barstow Irr. Co. v. Cleghorn (Tex. Civ. App.), 93 S. W. 1023; Sammons v. Kearney etc. Irr. Co., 77 Neb. 580, 110 N. W. 308, 8 L. R. A., N. S., 404. In a recent Idaho case it is said (relying on a Federal case following the Park case), "So, in this case, if the statute did not expressly authorize the making of such contract, still there being no constitutional or statutory inhibition against such contracts, the parties would have a right to make the same. This necessarily leads to the inevitable conclusion that the contract involved in this case was valid and binding upon the parties thereto." Jackson v. Indian etc. Co. (1909), 16 Idaho, 430, 101 Pac. 814, modified in 110 Pac. 251.

[8] Cal. Stats. 1901, p. 331. Also section 11½ of the act of 1885, p. 95, added 1897, p. 49. A Wyoming statute declares: "The use of water stored under the provisions of this act may be acquired on such terms as shall be agreed upon between the parties in interest." Wyo. Laws 1905, c. 14.

California district, Mr. Justice Ross expressed great dissatisfaction with the Park case, because the language used in it was not modified to inhibit contracts that were in their terms violative of the restrictive law (common law, if not statute) to secure reasonable service to all upon tender of a reasonable rate.[9] The facts presented in the Park case, however, did not involve such question, which accounts for the broad language used in it; but there can be little doubt that, the California constitution having placed the restrictive principle against unreasonable conduct of the business on high and secure ground, contracts unreasonable to the consumer or discriminating against other consumers, or violating other duties or restrictions of public service, are illegal. The general principle is that the duty of the company not to use its monopoly to enforce improper demands cannot be evaded by contract.[10] "Irrigation companies authorized to exercise the power of eminent domain are *quasi* public corporations, and cannot limit their liability to the public by contract." [11]

Indeed, practically concurrently with the Park case (in the volume of the reports following it), in as emphatic terms, it was held in the Crow case [12] that no contract *at all* can be binding because,—the company being bound by law to furnish water without a contract,—there can be no consideration for the contract.[13] So, also,

9 Souther v. San Diego etc. Co., 112 Fed. 228.

10 Cal. Civ. Code, sec. 3513. "Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement."

11 Headnote in Southwestern Reporter to Colorado etc. Co. v. McFarland (Tex. Civ. App.), 94 S. W. 400. See, also, S. C., 50 Tex. Civ. App. 97, 109 S. W. 435. See, also, Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404. Cf. Railroad Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. Ed. 627, and Hart v. Pennsylvania Ry., 112 U. S. 331, 5 Sup. Ct. Rep. 151, 28 L. Ed. 717.

12 Crow v. San Joaquin W. Co., 130 Cal. 309, 62 Pac. 562, 1058.

13 The court said: "If this could be considered as a contract binding upon the user of water for all future time, it would be without consideration, for it was the duty of the defendant company to furnish the plaintiff with water whether he agreed to the regulations or not," and further in the same case: "Under the provisions of section 1 of article 14 of the constitution, and of the act of March 12, 1885, to enforce the same, the sale, rental, or distribution of water is declared to be a 'public use,' and it is made the duty of a water company supplying water for distribution to furnish water upon tender of the established dates, and no other duty than such tender can be lawfully prescribed or imposed by such company as a condition for supplying water as required by law." The year following this decision the California legislature passed the act of 1901, quoted *infra*, sec. 1432, declaring contracts binding, "Any law or rule to the contrary notwithstanding," and declaring that waiver of payment in advance shall be sufficient consideration for such contract; evidently intended expressly to overrule the Crow case. If so, it is

in Idaho, a doctrine was laid down similar to the Crow case, and it was held that *no* contract can be binding upon a consumer with growing crops, because to require a consumer to sign it amounts *per se* to compulsion, oppression and duress, since his crops will be ruined if water is withheld.[14]

Between the Park case and the Crow case, the true law, as indicated in the later case of Leavitt v. Lassen Irr. Co., [15] is on a middle ground; namely, each case must be considered upon the facts presented, and examined to see whether any conditions or duties of public service are violated by the terms of the contract. The distributor must furnish, whether it contracts or not, a reasonable service upon tender of a reasonable rate. It is a question of fact in each case whether the terms of the contract are unreasonable or improper toward the consumer, or discriminate against other consumers, or turn over to private service property devoted to public use, or otherwise conflict with the public trust. In the Leavitt case, holding that the contract presented was invalid because of such a conflict (turning over to private service property in public use), Mr. Justice Henshaw said: "All are equally entitled to share in the use of the water who pay, or offer to pay, the legal rate and to abide by the reasonable rules and regulations of the company. It does not follow that a water company may not

probably unconstitutional. Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404.

[14] The court say: "In the case at bar the respondent avers that the irrigation company refused to deliver him any water until he signed said contract, and through fear that he would be unable to raise any crops whatever on said land if he did not secure the water, and being in immediate need of water for the irrigation of said lands, and defendant solemnly protesting to the officers and agents of said company against signing said contract, he signed it. . . . . If, through the fear of such threats being carried out, the defendant entered into said contract, the minds of the parties did not meet, and there was no valid contract entered into. . . . . When a party is entitled to water from a ditch company and does all that the laws of the State require him to do in order to get that water, the company is bound to deliver the water, and cannot legally require the party making the application to sign a special contract binding him to do things which the law does not require him to do. And a contract like the one in question executed under the circumstances alleged in the answer is in contravention of the laws of this State and is voidable, if not void." Green v. Byers, 16 Idaho, 178, 101 Pac. 79. See, also, Gould v. Maricopa Co., 8 Ariz. 429, 76 Pac. 601; Salt River Co. v. Nelssen, 10 Ariz. 9, 85 Pac. 117, 12 L. R. A., N. S., 711, 16 Ann. Cas. 796; Combs v. Agric. D. Co., 17 Colo. 146, 31 Am. St. Rep. 275, 28 Pac. 966; Wheeler v. Northern Irr. Co., 10 Colo. 582, 3 Am. St. Rep. 603, 17 Pac. 487; San Diego Co. v. City of National City, 74 Fed. 79; San Diego Co. v. Jasper, 110 Fed. 706; Mandell v. San Diego etc. Co., 89 Fed. 295; Wilterding v. Green, 4 Idaho, 773, 45 Pac. 134; Lowe v. Yolo etc. Co., 8 Cal. App. 204, 96 Pac. 379, 157 Cal. 503, 108 Pac. 297. See *supra*, sec. 1280, compulsory service.

[15] 157 Cal. 82, 106 Pac. 404.

make specific contracts with individual consumers which are within the purview of the constitution and within valid legislative enactments regulating the public use. This is precisely as decided by Fresno Canal Co. v. Park.[16] But, as decided in Crow v. San Joaquin Irr. Co.,[17] immediately following the Park case, such a contract, even if violated by the consumer, could not operate to deprive him of his constitutional right to the water furnished by the public service corporation upon tender to it of the legal rate. For the breach of the consumer's contract, the water company must seek other redress than that of depriving the consumer of his share of the supply."[18] And further said that, in view of the constitutional provision declaring the use a public one, the legislature cannot change this principle of law, and any statutes declaring the power of contract, so far as they might seem to authorize contracts in violation of reasonable and equal service upon tender of a proper rate, would be unconstitutional.[19]

Taking the above decisions as a whole, as well as upon principle, the rule seems to be that a contract with a consumer made by or required by a public service company is not *per se* invalid, but that the test of its validity is whether it contains terms or has an effect in excess of the reasonable rates, rules and regulations which the company is entitled to make; whether it is unreasonable being a question of fact in each case.[20] In the Park case[21] the binding force of a contract not shown to contain unreasonable conditions was upheld. On the other hand, contracts placing a substantial clog upon the right to receive service, such as contracts for excessive rates, or requiring in advance, as a condition, the payment of a "bonus" or "initiation fee," or the purchase of a perpetual "water-right," or the payment of all back dues in arrears, or requiring the waiver of the consumer's right under the law, or devoting the property in whole or part to exclusive private service, or discriminating against other consumers, or conflicting with the general duties of public service, have been held illegal;[22] nor, if

16 129 Cal. 437, 62 Pac. 87.

17 130 Cal. 309, 62 Pac. 562, 1058.

18 Again later saying: "In Fresno Canal Co. v. Park, *supra*, it was held that, in the absence of a rate fixed by the supervisors, a rate agreed upon between the parties could be enforced. In Crow v. San Joaquin etc. Canal Co., *supra*, it was held that a consumer did not deprive himself of the right to take water under the rate established by law by reason of his refusal to pay under and in accordance with the terms of his contract."

19 *Infra*, sec. 1325.

20 Colorado etc. Co. v. McFarland, 50 Tex. Civ. App. 92, 109 S. W. 435.

21 129 Cal. 441, 62 Pac. 87.

22 *Supra*, sec. 1280.

improper, can the legislature legalize them where the constitution declares the use a public one.

(3d ed.)

§ 1318. **Same.**—Contracts providing forfeitures of the consumer's rights thereunder, even when not invalid as unreasonable, and violative of the rule of compulsory service, will be strictly construed.[23] But where a consumer violates his contract in essential matters, the company may rescind it and sue for the reasonable value of services rendered irrespective of the terms of the contract (though it cannot shut off the water).[24] A contract to supply water "year after year, so long as he shall pay the annual rental therefor," may be terminated by the consumer at the end of any year.[25]

B. RATE CONTRACTS.

(3d ed.)

§ 1319. **Contracts Fixing Rates, in the Absence of Public Rate-fixing.**—The matters just covered apply to contracts fixing rates where the public authorities have not fixed a rate. Thus, in California it was considered settled by the Park case that the company may fix rates in its contracts under such circumstances; and so long as the contract rate is not unreasonably high nor discriminatory, this seems to be the law, and properly so.[1]

It is true that, as a phase of the assertion of contract regulation generally, the rule has been widely stated without the qualification.[2] So it has been held that a contract allowing a company to

23 "Forfeitures are not favored by the law, and while we do not say that a ditch company may not, by apt words in their contracts or by-laws, provide that a water-right shall be forfeited by failure to pay the price for the carriage of water, we do say that the words employed in the by-laws of this company do not so operate." Cooper v. Shannon, 36 Colo. 98, 118 Am. St. Rep. 95, 85 Pac. 175. See Kimball v. Northern Irr. Co., 42 Colo. 412, 94 Pac. 333. See *supra*, sec. 1280, compulsory service.

24 Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404; Lassen Irr. Co. v. Long, 157 Cal. 94, 106 Pac. 409.

25 South Boulder etc. Ditch Co. v. Marfell, 15 Colo. 307, 25 Pac. 504; San Diego Co. v. Sharp, 97 Fed. 394, 38 C. C. A. 220.

1 Fresno Canal etc. Co. v. Park, 129 Cal. 441, 62 Pac. 87; Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. 858, 15 L. R. A., N. S., 359; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404; Boise etc. Co. v. Turner (Idaho), 176 Fed. 374; Cal. Stats. 1885, p. 95, sec. 5 (as amd. in Stats. 1897, p. 49, and 1901, p. 80); Stats. 1901, p. 331.

2 The law is put in the broadest terms in a case in the United States circuit court of appeals for the circuit in which California lies, reaching a similar result before the Park case: "What is the trend and purport of the decision in that case, and of the other decisions of the supreme court of the State of California to which reference has been made? They are to the effect that, notwithstanding the fact

raise its rates is valid,[3] and a company may raise its rates where the contract does not fix them for any specific period of time[4] (but not where a specific time is fixed);[5] and it has been held that the contract rate may be made a lien upon the land supplied.[6]

But it seems clear that no contract can displace the power of the courts to prevent exaction of an excessive rate, nor prevent the consumer from tendering a reasonable rate and securing *mandamus*[7] if the contract rate is excessive (the reasonableness of his tender being a question of fact in each case); nor can a discriminatory contract be enforced by either party thereto.[8] The California statute that companies may, in the absence of action by the board of supervisors, fix their own rates,[9] and the statutes that contract rates shall be binding when the board has not acted[10] seem

that the constitution declares that the use of waters of the State appropriated for irrigation purposes is a public use, and the further fact that, under the law of 1885, upon the petition of twenty-five consumers, the commissioners of the county may fix the rates to be charged by the company and paid by the consumer, nevertheless, until such rates are fixed in pursuance of law, the corporation furnishing the water, and the consumer receiving it, are left free to make such contracts as they may see fit to make, and their agreement will be sustained by the courts. In other words, there is no provision of the laws of the State, and no principle of public policy which inhibits such contracts." San Diego etc. Co. v. Souther, 90 Fed. 164, 32 C. C. A. 548. This case was, after the rendition of this opinion, allowed to go over until the decision of the Park case, pending at the same time, and after the decision in the Park case, was affirmed. Same v. Same, 104 Fed. 706, 44 C. C. A. 143. See, also, Lanning v. Osborne, 76 Fed. 319; Souther v. San Diego etc. Co., 112 Fed. 229; San Diego etc. Co. v. Jaspar, 189 U. S. 445, 23 Sup. Ct. Rep. 571, 47 L. Ed. 74; San Diego etc. Co. v. Jaspar, 110 Fed. 706; Boise etc. Co. v. Turner (Idaho), 176 Fed. 373; Spring Valley Co. v. San Francisco, 165 Fed. 712; Jack v. Village of Grangeville (1903), 9 Idaho, 291, 74 Pac. 969; Jackson v. Indian etc. Co., 16 Idaho, 430, 101 Pac. 814, modified in 18 Idaho, 513, 110 Pac. 251; Bothwell v. Consumers' Co., 13 Idaho, 568, 92 Pac. 533, 24 L. R. A., N. S., 425. In Osborne v. San Diego Co., 178 U. S. 22, 20 Sup. Ct. Rep. 860, 44 L. Ed. 961, the headnote says rates cannot be fixed by contract, but this is error, as the decision was that *this* contract did not attempt to fix them, but left it to the company in the same manner as though there had been no contract. See, as to this headnote, San Diego Co. v. Souther, 104 Fed. 706, 44 C. C. A. 143.

[3] Osborne v. San Diego Co., 178 U. S. 22, 20 Sup. Ct. Rep. 860, 44 L. Ed. 961.

[4] *Ibid.*, and San Diego Co. v. Jasper, 189 U. S. 445, 23 Sup. Ct. Rep. 571, 47 L. Ed. 892; Lanning v. Osborne, 76 Fed. 319.

[5] Boise etc. Co. v. Turner (Idaho), 176 Fed. 373.

[6] *Supra*, sec. 537 et seq.

[7] *Supra*, sec. 1280.

[8] Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404; Lassen Irr. Co. v. Long, 157 Cal. 94, 106 Pac. 409, holding a contract for "free water-right" invalid as discriminatory, especially when coupled with a provision to serve the free right in priority to the paying customers. See Nampa Irr. Dist. v. Gess, 17 Idaho, 552, 106 Pac. 993, as to "free water-rights." See *supra*, sec. 1283, "discrimination."

[9] Cal. Stats. 1901, p. 80, amending Stats. 1885, p. 95, sec. 5.

[10] Cal. Stats. 1897, p. 49 (inserting sec. 11½ into Stats. of 1885, p. 95); and Stats. 1901, p. 331.

constitutional only to the extent that they may be construed not to take from the courts the power to grant relief to a consumer who shows that the company's rate or the contract rate was excessive or discriminatory. The power to grant relief from improper demands is placed beyond contract or company by a higher authority than the legislature, when the constitution declares the use a public one.[11]

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§ 1320. **Effect of Transfer of Water System upon Contract Rates.**—Where a rate has been validly fixed by contract for a definite period, it is usually held binding upon a successor of the company, when the water system changes hands upon a sale, or foreclosure of bond mortgage or other transfer, and the new company cannot raise the rate (at least as to all contract rates of which it has notice).[12] The theory upon which this is held is usually, in the case of mortgages, that it is an implied term in the mortgage that the company shall continue as a going concern, and do all reasonably necessary to that end, including the making of contracts with consumers; that therefore the mortgagor acted as an agent of the bondholders and of the foreclosure purchaser in making these contracts, which are consequently binding upon the latter.[13]

Even if the contract itself were not binding upon the successor, the new company nevertheless would not be entitled to raise the

11 Lassen cases, *infra.*

12 Clyne v. Benicia W. Co., 100 Cal. 310, 34 Pac. 714; Hunt v. Jones, 149 Cal. 97, 86 Pac. 686; Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. 858, 15 L. R. A., N. S., 359; Knowles v. New Sweden Irr. Dist. (1909), 16 Idaho, 217, 101 Pac. 81; Niday v. Barker (1909), 16 Idaho, 73, 101 Pac. 254; Nampa etc. Irr. Dist. v. Gess (1910), 17 Idaho, 552, 106 Pac. 993. See, also, Idaho Fruit Co. v. Great Western etc. Co. (1909), 17 Idaho, 273, 105 Pac. 562; Idaho Rev. Codes, sec. 3292; Western Irr. Co. v. Chapman (1899), 8 Kan. App. 778, 59 Pac. 1098; Sammons v. Kearney Power & Irr. Co., 77 Neb. 580, 110 N. W. 308, 8 L. R. A., N. S., 404; Clague v. Tri-State Co. (1909), 84 Neb. 499, 133 Am. St. Rep. 637, 121 N. W. 570; Almeria etc. Co. v. Tzschuck Canal Co., 67 Neb. 290, 93 N. W. 174; Boise etc. Co. v. Turner (Idaho), 176 Fed. 373; Cobbey's Ann. Neb. Stats., sec. 6817; Laws 1895, c. 69, p. 267, sec. 63.

13 Sammons v. Kearney etc. Co., 77 Neb. 580, 110 N. W. 308, 8 L. R. A., N. S., 404. Where the mortgagee retains the benefit of the contract and holds possession of the consideration given to the mortgagor, he will be held to have assumed the burden of the contract also, and be bound to furnish water as for an affirmance, adoption or novation of the contract. Clyne v. Benicia W. Co., 100 Cal. 310, 34 Pac. 714. Contracts of promoters to supply water at fixed rates have been held binding on the after-formed company which assumed the benefits of the contract. Robbins v. Bangor etc. Co., 100 Me. 496, 62 Atl. 136, 1 L. R. A., N. S., 963.

rate unless previously unreasonably low, for, irrespective of contract, the new company is bound like the old one to compulsory service upon tender of reasonable rates, and the old contract rate, when insisted upon by consumers, would be almost conclusive evidence of what is reasonable.

The matter arises because of the bankruptcy of irrigation concerns started in "boom" times. They then offer extravagantly favorable terms to the first settlers or consumers, and in time come to the inevitable end. Failure, foreclosure, and reorganization follow, and the new concern seeks a more rational basis for rates. It is a difficult situation, in which the sympathy of the courts is with the early consumers against the new company. Yet it is hard on new consumers, since they must pay higher to make up the loss, so long as the low early rates stand. Stanislaus W. Co. v. Bachman, *supra*, was a typical case of this kind, upholding the binding force of the early contract rate; and probably is still in good standing upon this point.[14]

(3d ed.)

§ 1321. **Effect of Public Rate-fixing upon Contract Rate-fixing.** The foregoing considered the matter of contracts fixing rates (not found to be unreasonable to the consumer) in the absence of public action fixing rates; and the contract rate is not affected by constitution or statute providing a public method, so long as that method has not been exercised.[15] But when the public authorities have acted and fixed a rate, what is its bearing upon the contract rate?

The California statutes upon the matter are inconsistent. In 1879 the constitution declared the distribution of water to the

[14] Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404. In Boise etc. Co. v. Turner (Idaho), 176 Fed. 373, a case of this kind, the new company was objecting to the old contract rates as too low (no public rate-fixing having been undertaken). The court held: "Certainly it may be argued, as it has been, that the enforcement of these contracts is a hardship to the company, as well as to the other water users, who may have to pay a higher rate to make good to the company its losses on them. It is, however, presumed that when these contracts were made the predecessor in interest of this company received some consideration for making them, which is presumed to inure to the benefit of this company. At any rate, it bought with knowledge of them. If it made an improvident contract, it can hardly ask the court to correct that misfortune, which is not alleged to be the result of either fraud or mistake."

[15] Boise etc. Co. v. Turner (Idaho), 176 Fed. 373; Fresno Canal Co. v. Park, 129 Cal. 441, 62 Pac. 87; San Diego Co. v. Souther, 90 Fed. 164, 32 C. C. A. 548, 104 Fed. 706, 44 C. C. A. 143.

public a public use and subject to State regulation, and specifically provided for rate regulation in cities, but left details outside of cities to the legislature.[16] The first legislature thereafter, under influence of the movement that enacted the constitution, passed an act giving rate-regulating power in irrigation to the county boards of supervisors and added that a company collecting a higher rate shall forfeit franchise and waterworks;[17] and a similar, more detailed, act was passed in 1885.[18] But the stress of the movement for public control died down in the following years; and so in 1897 an amendment to the act of 1885 declared that "nothing in this act contained shall be construed to prohibit or invalidate any contract already made, or which shall hereafter be made";[19] while in 1901, the movement which culminated in the constitutional convention being now well in the past, a new statute said that contracts with companies shall be valid, "any law or rule to the contrary notwithstanding," but that "no such contract shall provide for the sale, rental, or distribution of any such water at any rate exceeding the established rates fixed and regulated therefor by the board of supervisors," etc., but adding: "Nothing in this act contained shall affect any contract made prior to the time that the board of supervisors fix and establish the rates and regulations for and under which water may be sold and supplied."[20] It is said in Leavitt v. Lassen Irr. Co.,[21] that any statute conflicting with the constitution must fall; and therefore it may be that statutes validating contract rates where they conflict with those fixed by a public body are an attempt to evade the State control declared in the constitution, and unconstitutional.

As to rates made by contract while public rates are already in force this seems the plausible result. A public power actually exercised as fixed in the constitution cannot be displaced by private contract;[22] and the fact that the contracting consumer may be satisfied would further tend to show that he was getting an advantage over the public rate, which would be discrimination.[23]

16 Cal. Const., art. 14.
17 Stats. 1880, p. 16.
18 Stats. 1885, p. 95.
19 Stats. 1897, p. 49, adding sec. 1171½ to the statute of 1885.
20 Cal. Stats. 1901, p. 331.
21 157 Cal. 82, 106 Pac. 404, quoted *infra*, sec. 1325.
22 See Cal. Civ. Code, sec. 3513.
23 This seems to follow from the Lassen case, *supra*.

Stanislaus W. Co. v. Bachman, 152 Cal. 712, 93 Pac. 858, 15 L. R. A., N. S., 359, contained a *dictum* that "under the present statute the contract rights prevail in all cases, the boards of supervisors being powerless to affect or interfere with them," re-

As to contracts made while there was no public rate, however (the public rate being adopted subsequently), the question is a difficult one. Since contracts are valid so long as public action is not taken (provided the contract rate is not discriminatory or excessive), subsequent assumption of public control might seem to impair the obligation of contracts, within the Federal constitution.[24] On the other hand, it may be that the possibility of State control, being reserved by the constitution, entered into the contract, or the contract was made at the peril of later public action; moreover, there would be no uniformity of service (which is required by the constitutional declaration that the use is a public one) if some consumers paid according to contract and some according to the publicly fixed rates.

The matter has usually been treated as an open question,[25] though it may possibly be that the public rate displaces previous contract rates, as well as later ones.[1]

ferring to Stats. 1897, p. 49, inserting sec. 11½ into the act of 1885, p. 95. But the Lassen case generally disapproves the Stanislaus case. It is said by way of *dictum* in one case that after rates are already fixed by the supervisors, new contracts cannot fix a rate, as that would be evading the rate-fixing power given by law to the supervisors. Lanning v. Osborne, 76 Fed. 319. In an Alabama case it is held, however, that a contract rate is binding if *less* than the ordinance rate, and noncontracting consumers may be charged the ordinance rate, because the discrimination is then against the company and not against the consumers, unless the facts show actual bad faith toward the public. State ex rel. Ferguson v. Birmingham W. Co. (1910), 164 Ala. 586, 51 South. 354. See, also, Boise etc. Co. v. Turner (Idaho), 176 Fed. 373.

[24] See Los Angeles Co. v. City of Los Angeles, 88 Fed. 720; City of Pocatello v. Murray (C. C. Idaho), 173 Fed. 382.

[25] Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404; Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. 858, 15 L. R. A., N. S., 359 (*dictum* that contract rate would prevail); Boise etc. Co. v. Turner (Idaho), 176 Fed. 373 (*dictum* that public rate would prevail); Jackson v. Indian etc. Co., 16 Idaho, 430, 101 Pac. 814, saying: "We are not called upon to decide in this case, for the reason that it does not appear that such rates have ever been established by the board," etc. See Same v. Same, 18 Idaho, 513, 110 Pac. 251.

[1] In the Federal court for the circuit in which California lies (ninth circuit), Judge Ross has rendered two decisions. In Souther v. San Diego etc. Co. (Cal.), 112 Fed. 228, he felt bound by the broad language of the Park case to say by way of *dictum* that the contract rate prevailed, even though the board of supervisors subsequently acted and fixed a lower rate. But the Park case expressly left the question open, and had not decided it, as is also true of San Diego Co. v. Souther, 90 Fed. 164, 32 C. C. A. 548, 104 Fed. 706, 44 C. C. A. 143. The other case is Boise City Irr. Co. v. Clarke (Idaho), 131 Fed. 415, 65 C. C. A. 399, where Judge Ross in the circuit court of appeals held (under a constitutional provision similar to that of California) that when rates are, subsequent to a contract, fixed by the supervisors, they prevail as so fixed, at least as to noncontracting consumers. In Colorado, action by the county board fixing a rate has been said to prevail over a previous contract rate. Northern Colo. Co. v. Pouppirt, 47 Colo. 490, 108 Pac. 23; South Boulder etc. D. Co. v. Marfell, 15 Colo. 307, 25

(3d ed.)

§ 1322. **Contracts Between Companies and Cities.**—Not intending to say much upon city supply, contracts between water companies and cities are here mentioned only because the writer has the impression, from general reading, that a greater immunity from regulation prevails as to them than as to contracts between the company and individuals.[2] And there is ground for distinction, because the law of public control is to prevent advantage being taken of consumers, which is much less likely where the city authorities act in their behalf in making the contract, than where each individual is left to his own resources.

(3d ed.)

§ 1323. **Contracts by the United States Under the Policy of Conservation.**—As considered in another place, the United States has in some instances stipulated by contract with power companies as to the rate they shall charge as well as concerning the general management of the plant.[3] So far as the foregoing discussion of the effect of contract bears upon the proposal that public service companies should fix rates by contract with the United States, such contract would seem valid in form (as opposed to substance) so long as the contract terms are reasonable and in the public interest, and not in conflict with State statutes of similar qualification, or with State action thereunder. But in case of such conflict, it would seem that in theory the Federal contract would be of no more validity than a private one; and even if no such conflict, the practical result in substance would seem to be to take from the State, by contract with one of its citizens, the control which is placed in the State by the constitution; that is, change the form of government by contract.

Pac. 504. In Spring Valley W. W. v. San Francisco, 61 Cal. 3, it was held that a contract with a city as to how rates are to be fixed ceases of force after a constitution provides for public rate-fixing. Accord, Spring Valley W. W. v. Schottler, 110 U. S. 347, 4 Sup. Ct. Rep. 48, 28 L. Ed. 173. A recent Washington statute says the public service commission shall have no power to affect contract rates. Wash. Stats. 1911, c. 117, sec. 34.

2 For example, see Los Angeles Co. v. City of Los Angeles, 88 Fed. 720; City of Pocatello v. Murray, 173 Fed. 382; and cases *supra*, sec. 1272, regarding withdrawal from service. But see Spring Valley W. W. v. San Francisco, 61 Cal. 3; State ex rel. Ellis v. Tampa W. W., 57 Fla. 533, 48 South. 639, 22 L. R. A., N. S., 680; Spring Valley W. W. v. Schottler, 110 U. S. 347, 4 Sup. Ct. Rep. 48, 28 L. Ed. 173.

3 *Supra*, sec. 436.

C. CONTRACTS AS GRANTING ESTATES.

(3d ed.)

§ 1324. Whether Contracts Do or Can Grant "Easements" or "Water-rights" to Consumers, or Only Service Rights.—The conflict of views which has surrounded the Western law of waters is specially marked in the present connection. The prevailing tendency is, as in the Colorado law considered in the next chapter, to identify appropriators from natural streams and consumers from a public service distribution, and to work out the problems of the consumers' rights by a resort to the law of appropriation, resulting in an approach to public ownership. By so doing the consumer is frequently regarded as having an actual estate in the water system, a "water-right" or "easement in the ditch," or an "incorporeal hereditament," or some such phrase to indicate a freehold interest in real estate. But that goes further than (and by some authorities has been held to be inconsistent with) the theory and aims of the law of public service, or distribution of water to public uses, based upon public control alone, without consumers' ownership.

The law of California had been tending to the Colorado view. It has been held in Stanislaus W. Co. v. Bachman [4] that a contract with an irrigation company may vest a proprietary estate in the consumer, called a "water-right" or "servitude upon the company's ditch" and an "appurtenance to the consumer's land." The rule thus appeared to be made general in California, since the contract in question was of a very common form, one of the reasons for the California decision being given at the oral argument by Mr. Justice Shaw that the form of contract involved had been in use in the San Joaquin Valley for thirty years.[5] Moreover, this idea has

[4] 152 Cal. 716, 93 Pac. 858, 15 L. R. A., N. S., 539.

[5] The question in the Stanislaus case was considered as one of construction of the words of the contract, upon the same basis as between private interests. The words insisted on in that case were, "That the party of the first part agrees to furnish—through its canal from the Stanislaus River—a flow of water sufficient to fully irrigate" the described land; together with words making the contract perpetual, with the use of the word "rental" as peculiarly applicable to a grant of real estate, and with words that the company "grants the right to use water from said canal on said lands for domestic purposes," etc. In this case the court, Mr. Justice Shaw rendering the opinion, said: "We think it is also clear that the effect of the agreement was to confer upon Threlfall a right to such portion of the water flowing from the Stanislaus River through the canal of the company as should be required for the full irrigation of the land, and to have the canal and ditch used for the purpose of conducting the same to the land, and that it is more than a mere personal covenant on the part of the

certainly always been the understanding of the California legislature, as appearing inferentially in the wording of statutes, though not expressly declared. The statute of 1897 [6] has a proviso that the act shall not invalidate any contract relating to the sale or rental of "easements and servitudes of the right to the flow and use of water," and section 552 of the Civil Code [7] declares concerning the right to have water from a company that "the right to the flow and use of said water is and shall remain a perpetual easement to the land," thereby regarding such contracts as having for their subject matter the water-right in the natural stream, and as conferring upon the consumer an actual estate in the distributing system, more than a right of service. The logical end of that would be that when the number of consumers reaches the capacity of the system, the system becomes wholly the property

company. . . . . The agreement to furnish the necessary water from the canal from year to year, during the time specified, and to deliver it upon the Threlfall lands for the irrigation thereof, for an agreed price, was in substance and effect an agreement for the sale of real property of the canal company." (Threlfall was the predecessor of the defendant consumer, the contract right having passed to defendant by purchase from Threlfall.) In support of this decision, see Fudickar v. East Riverside Co., 109 Cal. 29, 41 Pac. 1024; Orcutt v. Pasadena etc. Co., 152 Cal. 599, 93 Pac. 497; Graham v. Pasadena L. & W. Co., 152 Cal. 597, 93 Pac. 490. In S. Pasadena v. Pasadena L. & W. Co., 152 Cal. 579, 93 Pac. 490, it was said: "If the water is supplied for use upon land for its benefit, as for irrigation, the right to receive and use it becomes in the nature of an appurtenance to the land. If it is supplied for personal use to all persons within a certain territory or to all of a certain class within the territory, the right to its use is personal to the inhabitants of the territory, or to the members of the class, as the case may be, so long as they remain such." Suppose a flour-mill, or distribution to miners.

In effect, this was a holding that the words of the contract, granting a use and flow from a natural stream, granted an interest in the usufructuary right of the company in the stream; giving the consumer a proprietary interest approaching (though not reaching) the Colorado view that the consumer is an appropriator from the natural stream, as set forth in the next chapter. A rehearing having been granted in the Stanislaus case (chiefly on grounds not involving the law of waters), the company strenuously contended that the contract was merely one of sale of water, of liquid, like the sale of gas in cities, and for service in delivering it, and did not bind the usufructuary water-rights of the company nor give the consumer any proprietary interest therein. Such is undoubtedly the effect of a contract with a city supply company; it sells personal property, the water as merchandise, and does not profess to grant a perpetual flow from a natural stream. Its contract is primarily one of service merely. Hesperia L. & W. Co. v. Gardiner, 4 Cal. App. 357, 88 Pac. 286; People ex rel. Heyneman v. Blake, 19 Cal. 579. But on the second hearing the supreme court in the Stanislaus case reaffirmed its decision as above. (See *supra*, sec. 62 et seq.)

[6] Page 49, inserting sec. 11½ into the act of 1885, p. 95.

[7] Enacted 1875–76, p. 77. See concurring opinion of Myrick, J., in Price v. Riverside Co., 56 Cal. 433, at 441.

of the consuming public—resulting, that is, in public ownership, and not merely public control.

In accord with this view are not only the decisions in the next chapter, holding the consumers to be actual appropriators from the natural stream and holders of freehold water-rights as such, even aside from contract, but also other decisions reaching the same result upon the basis of contract. Thus, in a recent Idaho case it was held that a contract with a public service agency (an irrigation district) conveyed a "free and perpetual water-right"; not a mere "lien" or "encumbrance" upon the canal, but an actual "water-right," such as one has who diverts a natural stream; and when the public service agency has made contracts to the capacity of its plant, it has wholly conveyed away its water-right, and then is "without any further interest in the canal or water-right."[8]

This is, probably, the popular conception of the situation.

(3d ed.)

§ 1325. The Present California Rule—Leavitt v. Lassen Irr. Co.—But the Stanislaus case, so far as it dealt with this matter, was practically overruled in Leavitt v. Lassen Irr. Co.,[9] and the statutes, so far as they might have such effect, would, it was said, be unconstitutional, as in conflict with the provision in the constitution [10] that the property is (and, the court held, must remain) devoted to public use, and can become no individual consumer's property. A consumer, it is now held, can receive from a public distributing company a right of service, sharing in the use as a member of the public; but no private estate in the water-rights or distributing system can attach to any individual consumer. It is held that under the law of public service, properly speaking, the public right being paramount, no private estate can legally be carved out of the property devoted to that service; a member of the public can obtain a right only as such, and cannot maintain a right in his private capacity. When water-rights in a given stream, together with the canals and distributing system, are devoted to the public service, it would, it is held, withdraw them from that service to make them the private property of individual consumers.[11]

[8] Nampa etc. Irr. Dist. v. Gess (1910), 17 Idaho, 552, 106 Pac. 993. See, also, Idaho Rev. Codes, sec. 3292.

[9] 157 Cal. 82, 106 Pac. 404, and Lassen Irr. Co. v. Long, 151 Cal. 94, 106 Pac. 409.

[10] Art. 14, sec. 1; *supra*, sec. 1264.

[11] *Supra*, secs. 1270, 1271.

In the Leavitt case the consumer claimed that, having by contract obtained such a private estate or private water-right out of the distributing system, with a grant of prior service over other consumers, and the contract having the effect that it was fully paid for, it was his for all time, and he could not be required to pay any charges that were thereafter levied, nor be liable for rates. Judgment to this effect in the lower court was reversed on appeal. Such a transaction, the court held, would give this consumer a "private right in the public use," and a preference right over the general public;—no private estate can be created in the property devoted to public use, and the consumer cannot have a water-right in the sense of a private freehold interest in the real estate of the distributing system. Mr. Justice Henshaw, delivering the opinion of the court, after noting various arguments which the court holds it unnecessary to consider, said:

"But the paramount question renders unnecessary their consideration and determination. That question may be thus stated: Waiving all minor objections, had Purser the power so to burden his public trust with this perpetual private right? Purser, it is to be remembered, held all of these waters as an appropriator for sale, rental and distribution under the constitution of 1879. He was but the purveyor of this public use, the agent in the execution of this public trust. If, by any method, however devious, there can be carved out of this public trust such a private right, it must obviously result in the destruction of the public use itself. . . . . The fundamental and all-important proposition, then, is this: That a public service water company which is appropriating water under the constitution of 1879, for purposes of rental, distribution and sale, cannot confer upon a consumer any preferential right to the use of any part of its water. . . . . The language of this court in Stanislaus Water Co. v. Bachman [12] must be construed in the light of the facts there presented. . . . . The opinion, in the main, goes upon the theory that the water in control of the company was not subject to a public use, and upon that theory it was held that the contract to furnish water to Bachman's land attached the water-right to it as an appurtenance, with the right to receive water from the previous owner of the system and its successors at the contract rates. The company made the additional argument that the water was in fact devoted to public use, that if it could be thus attached to land

12 152 Cal. 716, 93 Pac. 853, 15 L. R. A., N. S., 359.

as an appurtenance, the property dedicated to public use would be converted into private property, and that, as this could not be permitted, the contract was against public policy and void, so far as it attempted to create the appurtenance or fixed rates. This argument is not fully stated in the opinion. In answer to the argument, the court cited the case of Fresno etc. Co. v. Park, *supra,* and declared that the constitutional provision regarding water devoted to public use did not prevent a water company from making a contract giving to a particular tract of land the right to receive water for permanent and continuous use for irrigation, subject to the condition that the public authorities could regulate and control the use. Such a contract disposing of water devoted to public use of course would not technically attach it to the land as an appurtenance. It would do nothing more than bring the land within the territory to which the public use extended, and establish its status as land permanently entitled to share in the public use. It did not appear in that case that any public regulation had been made, and the contract controlled the rights of the parties. It was therefore immaterial, so far as the right to collect the rates in controversy in that case was concerned, whether the water-right was appurtenant to the land as private property, or whether the land was entitled to a part of the water as a sharer in the public use, where public rates had not been fixed and private contracts controlled. This is the essence of the decision, and it does not conflict with Hildreth v. Montecito, *supra,* or any other cases on the subject of public use. . . . .

"It is, of course, a truism of the law that an act of the legislature conflicting with constitutional provision must fall. All of the acts of the legislature regulating or attempting to regulate the public use of waters so appropriated are subordinate to the provisions of the constitution and, to be valid, must be in harmony therewith. We have said, and undertaken to show, that a water company organized under the constitution of 1879, which has appropriated waters of the State for public rental, distribution and sale, cannot give a preferential right to one consumer over another. Permanent rights, in a limited sense, such consumers may acquire. That is to say, having once been supplied by the company, they are entitled to a continuation of such supply, unless their *quantum* shall be diminished by a shortage for which the water company is not responsible, or a shortage by reason of the

increased demand of added consumers. In such cases the duty of the water company is to supply such water as it has, fairly apportioned between its consumers. If it be conceived that section 552 of the Civil Code is designed to confer upon any particular consumer any especial, permanent and preferential right above what is here stated, that effort, being plainly violative of the constitution, would be held void. The same declaration applies to the provision of" [certain statutes].[13]

Perhaps the essence of the decision is in the statement. "attempted reservation of a private right out of a public trust, as above stated, would be futile and void."[14]

(3d ed.)

§ **1326. Whether Charge can be Made for a "Water-right" in Addition to the Rates.**—It may possibly follow in California (the writer does not express any opinion relative thereto, but merely mentions the point) from this decision that, since a public service irrigation company cannot give to any consumer an actual interest in real estate (whether it be called a "water-right" or an "incorporeal hereditament" or an "appurtenance" or an "easement"), but only a right of service in common with the public as such, therefore any initial charge made by the public service company for a so-called "water-right" may be illegal. Such "water-right" charges are almost universally made, and it is with diffidence that this query is put. So far as the distributor furnishes simply its service, such charge might be, possibly, illegal as a clog upon the duty of compulsory service, the company being bound by law to serve all the public without exacting any "initiation fee";[15] and so far as the company furnishes, under the above decision, nothing

[13] "'An act to regulate and control the sale, rental and distribution of appropriated waters in this State other than in any city, city and county, or town therein, and to secure the rights of way for the conveyance of such water to the place of use,' approved March 12, 1885, and of the amendment to that act by the act approved March 2, 1897." Stats. 1897, p. 49.

[14] The court put this case by way of illustration: "Nakedly stated, it amounts to this, that a corporation which has appropriated water which the constitution has declared shall forever be devoted to a public use, may contract with A, B and C to supply them in perpetuity with a given quantity of this water, and then, by assigning in turn A, B and C its rights under these contracts, confer upon A, B and C a private right superior to and destructive of the public use. If this can be done with one it may be done with many, and water which has thus been appropriated for public rental, distribution and sale may, by this legerdemain of the law, be transferred into private ownership and use. This may not be done."

[15] *Supra*, sec. 1280.

but its service, and the consumer gets no "water-right," properly speaking—no interest in real estate—the charge for such initial "water-right" has been said to be invalid on the ground that it is without consideration.[16] In some States it is provided by statute that any charge for a so-called "perpetual water-right," in addition to the regular rates, is illegal.[17]

But under the other view previously stated, that a contract with a distributor conveys to the consumer an interest of ownership in the canal and distributing system, including the natural resources involved—an actual "water-right" in the natural stream from which the supply comes—it is not so clear that an extra charge may not be made therefor, in addition to the rates for service, carriage, or delivery.

And in any event, owing to the added value which the mere creation of an irrigation system gives to lands in the vicinity, a charge covering this benefit conferred might properly be added as part of a reasonable rate (or as a charge for the *land,* where land is sold).

(3d ed.)

§ 1327. **Comments.**—That the recognition of a private estate in the natural source of supply, or "water-right," properly speaking, in the consumer, as held in the Stanislaus case and the decisions in Colorado and other States below considered, is prohibited by the law of public service, as held in the Leavitt case, is not, to the writer, entirely clear, though a grave question. That there are limitations and public restrictions upon the effect of contracts made by public service companies is the essential part of the law of public service, and the recognition of *exclusive* private rights of realty in consumers would be violative of those limitations; in a

[16] San Diego etc. Co. v. City of National City, 74 Fed. 79; San Diego etc. Co. v. Jasper, 110 Fed. 706; Mandell v. San Diego Co., 89 Fed. 295; Souther v. San Diego Co., 112 Fed. 228.

See, also, Wheeler v. Northern Irr. Co. (1888), 10 Colo. 582, 3 Am. St. Rep. 603, 17 Pac. 487; Combs v. Agric. D. Co., 17 Colo. 146, 31 Am. St. Rep. 275, 28 Pac. 966; Green v. Byers (1909), 16 Idaho, 178, 101 Pac. 79; Wilterding v. Green, 4 Idaho, 773, 45 Pac. 134; Boise etc. Co. v. Clark, 131 Fed. 415, 65 C. C. A. 399 (*dictum*); Lowe v. Yolo etc. Co., 8 Cal. App. 167, 96 Pac. 379. See Same v. Same, 157 Cal. 503, 108 Pac. 297; Crow v. San Joaquin etc. Co., 130 Cal. 309, 62 Pac. 562, 1058; Souther v. San Diego Co., 112 Fed. 228. Cf. *semble contra,* Flume Co. v. Souther, 104 Fed. 706, 44 C. C. A. 143.

[17] Colo. Laws 1887, p. 308; Rev. Stats. 1908, sec. 3271 (quoted *infra* in the collection of Colorado statutes); Idaho Laws 1899, p. 380, sec. 20; Rev. Codes, sec. 3290. See *supra,* sec. 1280, compulsory service.

public use all consumers are reduced to a general level; there must be no individual variations; no one must be better off than his neighbor. But it is not so clear if the individual ownership is an undivided share in the common supply, all being equal in right, and proper safeguards being provided against discrimination. It seems to end simply in public ownership by the consuming public. Take the illustration put in the Leavitt case, where a company, having consumers to the extent of its capacity, conveys its water-rights outright to the consumers. The company does not thereby cease to be in public service, subject to all the duties thereof. True, it no longer owns any water-rights, but it still is engaged in public service—the distribution of the water.[18] No more than before is the road open to discrimination or extortion or preference, by the mere fact that the water-rights no longer belong to it, but belong to the consuming public in common. Nor is the road thus opened because the water-rights are in the consumers' ownership, if they are regarded as common rights on equal footing in a common supply, and priorities are discarded. In other words, public ownership is not inconsistent with the principles of public service, but only a radical extension thereof.

The general practice in the arid region has been said to be: "The old contracts were modified by adding a provision that when the water-rights were all sold, the canal property would be turned over to a stock company composed of the water users, the stock to be issued in exchange for the water-right contracts.[19] These stock companies are now the most common type throughout the arid region. Both the State laws, accepting the terms of the Carey Act and the Reclamation Act, provide for works built under these laws being turned over to such companies."[20] That the application of the law of prior appropriation is inconsistent with the law of public service, as the Leavitt case holds, seems clear; but if priorities are laid aside, the public interest seems to be promoted, rather than defeated, by the above transaction, which results, not

[18] See Strong v. Baldwin (Cal. 1908), 154 Cal. 150, for a corporation managing works purely as agent of the owners. See Walnut Irr. Dist. v. Burke (Cal.), 110 Pac. 518.

[19] See La Junta etc. Co. v. Hess, 6 Colo. App. 497, 42 Pac. 50; Wyatt v. Larimer Co., 18 Colo. 298, 36 Am. St. Rep. 280, 33 Pac. 144; Blakeley v. Ft. Lyon Co., 31 Colo. 224, 73 Pac. 249; Water Supply Co. v. Larimer Co., 24 Colo. 322, 51 Pac. 505, 46 L. R. A. 322; Broadmoor Co. v. Brookside Co., 24 Colo. 41, 52 Pac. 792; Idaho etc. Co. v. Great Western Co., 18 Idaho, 1, 107 Pac. 989.

[20] Report of the United States Department of Agriculture, Office of Experiment Stations, on the "Duty of Water" for 1909.

in displacing public control, but simply in adding public ownership.[21]

There is also an economic side of it. If the companies can collect nothing but an annual rate, they are not often successful because they get no return for the first cost, nor for the enterprise of promotion. In a region of great aridity rates might be made to do, because a high price is obtainable; but in places of less necessity, rates cannot be so high, nor will farmers use water at all except in dry seasons, and the business becomes precarious. Consequently from a financial point of view it is difficult to establish any new irrigation system where the distributors do not receive, in addition to the rates, some profit from the creation of the system, such profit coming either from ownership by the company of irrigable land in the vicinity reaping the benefit of its increased value, or else from a special initial charge, usually called the "water-right" charge.[22]

D. CONTRACTS ARE CONCURRENT ONLY.

(3d ed.)

§ 1328. Contract Rights, When Valid, are but Concurrent With the Noncontract Right.—The public service right is wholly irrespective of contract,[23] or, as has been said, "the right of an individual to a public use of water is in the nature of a public right possessed by reason of his status as a person of the class for whose benefit the water is appropriated or dedicated."[24] Where

[21] At most, it would consist only in turning public service companies into large mutual companies, with the consent of all consumers. Compare the following: "But it is said that plaintiff has entered into contracts with Rockefeller, Horton, Legate and others, persons of whom the plaintiff has secured its water-rights, to supply them, their cattle, etc., with necessary water. Very true. It also may engage with every householder in the village of North Tarrytown to supply them with water. This would not destroy the public use. It would rather tend to show use by many, and thus establish that the use was for the public benefit." Pocantico Waterworks Co. v. Bird, 130 N. Y. 259, 29 N. E. 246.

[22] For example, in Stanislaus W. Co. v. Bachman, *supra*, the initial "water-right" charge was ten dollars per acre in addition to the rate.

[23] Spring Valley W. W. v. San Francisco, 61 Cal. 3, at 8.

[24] Hildreth v. Montecito W. Co., 139 Cal. 23, 72 Pac. 395; Mahoney v. American L. & W. Co., 2 Cal. App. 185, 83 Pac. 267; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404. Where one relies and claims solely on enforcing his contract, it is error to decree him relief as an appropriator and user of water not based on the contract. Jackson v. Indian etc. Co., 16 Idaho, 430, 101 Pac. 814; see Same v. Same, 18 Idaho, 513, 110 Pac. 251, though such alternative relief might perhaps be granted him if claimed in his pleadings and relied on concurrently with his contract. When one has appropriated from a stream, and later conveys his ditch to

a contract right exists, it is only cumulative thereto. It does not displace the underlying right belonging to the consumer as a member of the public, such as the right to enforce compulsory service, or to complain of unreasonable or discriminatory conditions;[25] and probably a contract requiring the consumer in advance to surrender this public right is *per se* illegal.[1]

The concurrent nature of the contract and noncontract rights is shown in numerous ways. Thus, the concurrent rights are enforced by different remedies: Rights resting on a special contract possibly may be enforced by a bill in equity for specific performance,[2] but they cannot (whereas the noncontract right can) be enforced by *mandamus*,[3] and if the remedy sought be *mandamus*, it is measured, not by the contract, but by the statutes, or, in absence of statutes, by the rules of common law, devoted to securing reasonable service at reasonable rates.[4] Again, for failure or refusal to supply, there are concurrent remedies in tort and contract, and the consumer may recover under either liability.[5] These concurrent grounds of liability are well recognized in other branches of the law of public service, such as common carriers.

a city, reserving a right to water, he is a prior appropriator to the city, which cannot charge him for the water; but it is otherwise where he has no such appropriation but only a contract right from city. City of Denver v. Walker (1909), 45 Colo. 387, 101 Pac. 348. See, upon somewhat similar facts, Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404.

25 *Supra*, c. 54.

1 See San Diego Co. v. Sharp, 97 Fed. 394, 38 C. C. A. 220, actually holding, however, only that such a waiver (of sec. 552, Cal. Civ. Code) is of no force after the time has expired in which water was to have been furnished under the contract. See, also, Green v. Byers (1909), 16 Idaho, 178, 101 Pac. 79.

2 Perrine v. San Jacinto etc. Co., 4 Cal. App. 376, 88 Pac. 293, *dictum*. See Hunt v. Jones, 149 Cal. 300, 86 Pac. 686; Clyne v. Benicia Water Co., 100 Cal. 310, 34 Pac. 714. See *supra*, sec. 207. Such should be the law, but see Cal. Civ. Code, sec. 3390, subd. 1. See, also, Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. 858, 15 L. R. A., N. S., 359.

3 *Supra*, sec. 1280. But see S. Pasadena v. Pasadena L. &. W. Co., 152 Cal. 579, 93 Pac. 490; Graham v. Pasadena L. & W. Co., 152 Cal. 596, 93 Pac. 498; Orcutt v. Pasadena L. & W. Co., 152 Cal. 599, 93 Pac. 497, seeming to authorize *mandamus* to enforce a contract in this connection.

4 *Supra*, c. 54. See Perrine v. San Jacinto Co., 4 Cal. App. 376, 88 Pac. 293.

5 See Crow v. San Joaquin Co., 130 Cal. 309, at 314, 62 Pac. 562, 1058; Clague v. Tri-State Co., 84 Neb. 499, 133 Am. St. Rep. 637, 121 N. W. 570; Sisk v. Gravity etc. Co. (Tex. Civ. App.), 113 S. W. 195; Colorado Canal Co. v. McFarland et al. (Tex. Civ. App.), 94 S. W. 403, citing City of Ysleta v. Babbitt, 8 Tex. Civ. App. 432, 28 S. W. 703. See, also, Sample v. Fresno Flume & Irr. Co., 129 Cal. 222, 61 Pac. 1085; Northern etc. Co. v. Richards, 22 Colo. 450, 45 Pac. 423; Pawnee Land etc. Co. v. Jenkins, 1 Colo. App. 425, 29 Pac. 381; Hewitt v. San Jacinto etc. Dist., 124 Cal. 186, 56 Pac. 893.

Likewise a consumer under contract may terminate a contract at the end of any year for which rentals are fixed, and not be liable for damages for breach of contract for not paying future rentals.[6]

[6] South Boulder etc. Ditch Co. v. Marfell, 15 Colo. 307, 25 Pac. 504.

§§ *1329–1337. (Blank numbers.)*

CHAPTER 57.

CONSUMERS AS APPROPRIATORS—PUBLIC OWNERSHIP AS DISTINGUISHED FROM PUBLIC CONTROL.

§ 1338. The rule in the desert States.
§ 1339. Public ownership of water resources.
§ 1340. Statement of the authorities.
§ 1341. Same—Continued.
§ 1342. Same—Continued.
§ 1343. Results of the rule—Priorities.
§ 1344. Same.
§ 1345. Parties to actions.
§ 1346. Change of use.
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§§ 1348–1355. (Blank numbers.)

(3d ed.)

§ 1338. **The Rule in the Desert States.**—In Colorado and the arid States generally (following the lead of Colorado) the law of appropriation has so completely become the source of rights in waters, that the rights of consumers from corporations are made, as far as possible, to conform to the law of appropriation. The rule of the arid States is that (wholly irrespective of mutual companies in private service) the consumer from a ditch is, through the intermediate agency of the ditch, an appropriator from the natural stream from which the company's ditch heads, and a part owner in the natural resource and in the canal and distributing system. The water company thus becomes literally a common carrier of water; owning (in the last analysis) no water-rights of its own, and simply carrying the consumers' water to them from the natural resource, the rights in which also belong to the consuming public. It is closely approaching public ownership of irrigation systems. The right of the consumer is not merely a right of service (without any proprietary right in the water-rights or water system), but is a proprietary right in the natural stream as though the consumer had himself diverted the water from its natural source; the consumer *pro tanto* is the appropriator and proprietor of the water-right.

In the absence of some such rule, the consumer from a public service company (as distinguished from a private service mutual

company) has only a right of service without any proprietary interest in the real estate of the distributing system; the public right being one of control and not of ownership, as in a previous chapter. But courts are anxious to protect the irrigator and give stability to his rights, which, it is sometimes considered, is forwarded by regarding his right as more substantial than merely a right of service under public control. The California court once held that a proprietary right may pass to the consumer by contract, which has been practically overruled since the previous edition of this book.[1] But even aside from contract the arid States apply the rule that the consumer has a proprietary right. Irrespective of contract, and without the intermediacy of a grant, the consumer's right is that of an appropriator as by original acquisition, as distinguished from a derivative right of service from year to year. His rights are worked out more upon the basis of ownership than upon the basis of public control.

(3d ed.)

§ 1339. **Public Ownership of Water Resources.**—This view is an evolution from several sources.

The Colorado constitution declares that "The water of every natural stream not heretofore appropriated, within the State of Colorado, is hereby declared to be the property of the public."[2] In Wyoming it is declared "the property of the State,"[3] and similar provisions exist in the constitution or statutes of almost every Western State (except, until 1911, California).[4] This has been a strong influence.

This is coupled with other influences, however. One instance is the provision that the right to make an appropriation of unappropriated waters "shall never be denied,"[5] and it is frequently provided by statute in the interior States that the right obtained by appropriation for irrigation shall "inhere in the land irrigated."[6] A further influence, and indeed the one in which the movement took its start, is the transition, for some time now in progress in the law of appropriation of streams, from a possessory to a use system. Under the possessory origin, the appropriator was he who held possession of the stream—the canal company—as has always remained the law in California. But under the newer *use*

1 *Supra*, secs. 1324, 1325.
2 Const., art. 16, sec. 5.
3 Const., art. 8, sec. 1.
4 *Supra*, sec. 170.
5 *Supra*, secs. 108, 109.
6 *Supra*, sec. 282.

basis (as opposed to the possessory basis), the consumers in Colorado were held to be the appropriators of the natural resource because they *accomplished* the actual use, even if the canal company held possession of the stream.[7]

There must also be noted the great prevalence of mutual companies, which have become confused with public service companies.

These things combined have shaped the law of Colorado, Wyoming and the interior States in the direction that a right to the natural resource (with a corresponding interest in the distributing system) belongs to the consumer, with a result fast approaching public ownership. The water-rights and an estate of ownership in the distributing system belong to the consuming public as property, and the canal company is only an agent to enable the consumers (the appropriators) to make beneficial use of their appropriations. This view of the status of the right of a consumer as being *per se* greater than one of service and as amounting to actual "water-right" ownership with an "easement in the ditch or canal" seems to be the rule in numerous jurisdictions.[8]

[7] *Supra*, secs. 139, 395.

[8] Some of the following cases are not clear upon the matter, but are cited because they seem more or less to take this ground:

Arizona.—Slosser v. Salt River Co., 7 Ariz. 376, 65 Pac. 332; Gould v. Maricopa etc. Co., 8 Ariz. 429, 76 Pac. 600; Salt River Co. v. Nelssen, 10 Ariz. 9, 85 Pac. 117, 12 L. R. A., N. S., 711; Hargrave v. Hall, 3 Ariz. 252, 73 Pac. 400; Montezuma Canal Co. v. Smithville Canal Co., 11 Ariz. 39, 89 Pac. 512; Marlar v. Maricopa etc. Co., 9 Ariz. 102, 96 Pac. 1116; Salt River Valley Co. v. Slosser, 9 Ariz. 102, 96 Pac. 1117; Same v. Van Fossen, 9 Ariz. 103, 96 Pac. 1117; Slosser v. Salt R. Co., 9 Ariz. 104, 96 Pac. 1117.

Colorado.—Wheeler v. Northern Irr. Co., 10 Colo. 582, 3 Am. St. Rep. 603, 17 Pac. 487; Farmers' Highline Co. v. Southworth, 13 Colo. 111, 21 Pac. 1028, 4 L. R. A. 767; Combs v. Agricultural D. Co., 17 Colo. 146, 31 Am. St. Rep. 275, 28 Pac. 966; Wyatt v. Larimer etc. Co., 18 Colo. 298, 36 Am. St. Rep. 280, 33 Pac. 144, reversing 1 Colo. App. 480, 29 Pac. 406; Standart v. Farmers' etc. Co., 25 Colo. 202, 54 Pac. 626; Grand Val. Irr. Co. v. Lesher, 28 Colo. 273, 65 Pac. 44; La Junta Co. v. Hess, 6 Colo. App. 497, 42 Pac. 50; Farmers' etc. Co. v. New Hampshire etc. Co., 40 Colo. 467, 92 Pac. 290; Northern etc. Co. v. Pouppirt, 47 Colo. 490, 108 Pac. 23.

Idaho.—Hard v. Boise City etc. Co., 9 Idaho, 589, 76 Pac. 331, 65 L. R. A. 407. But see Creer v. Bancroft W. Co., 13 Idaho, 407, 90 Pac. 228; Farmers' etc. Co. v. Riverside Irr. Dist., 14 Idaho, 450, 94 Pac. 761; Idaho etc. Co. v. Great Western etc. Co., 18 Idaho, 1, 107 Pac. 989.

Nebraska.—Farmers' Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. 286; Farmers' etc. Co. v. Brumbaugh, 81 Neb. 641, 116 N. W. 513.

New Mexico.—Albuquerque etc. Co. v. Gutierrez, 10 N. M. 177, 61 Pac. 357. Affd. in Gutierres v. Albuquerque etc. Co., 188 U. S. 545, 23 Sup. Ct. Rep. 338, 47 L. Ed. 588.

Oregon.—Stats. 1909, c. 216, sec. 58.

Wyoming.—Laws 1903, c. 69, sec. 2. See Wyoming Central Irr. Co. v. Farlow (Wyo.), 114 Pac. 635.

(3d ed.)

§ 1340. **Statement of the Authorities.**—A statement may be made of the principal cases.

The first Colorado case is Wheeler v. Northern Irr. Co.[9] In this case the question was one of compulsory service without the exaction of a bonus, and Helm, C. J., works out the decision chiefly on the general laws of control of public service companies (the system governing railways, common carriers, gas companies, etc.). However, he makes some observations upon the relative status of the company and its consumers regarding title to the right of flow and use of the natural stream, and says, "I cannot consent to the proposition that the carrier becomes a 'proprietor' of the water diverted," and again, "The carrier must be regarded as an intermediate agency," etc. This clearly intimated that the company held no title to the water-rights; that the real estate in the natural source of supply belonged to the consumers, under the Colorado constitutional provision that waters within the State are "the property of the public."

It was in the next case, Farmers' etc. Co. v. Southworth,[10] that the matter first took definite shape. The question was whether consumers could be forced to pro-rate in time of deficiency. Under the general law of public service companies they would, but under the law of appropriation a prior appropriator has an exclusive right at all times, and a deficiency would fall wholly on users later in time. It was held that the latter rule applied. The three judges disagreed on the grounds of the judgment, however. The opinion of Mr. Justice Elliott said *inter alia:* "The carrier is the agent, the consumer is the principal. . . . . It is claimed that the constitution recognizes priorities only among those taking water from natural streams. . . . . Every consumer cannot take the water directly from the natural stream. Irrigating ditches and canals must be resorted to as a means of diverting and carrying the water to places where it can be beneficially applied. No good reason can be urged why a consumer obliged to make use of such an agency [belonging to a company] should not be protected equally with those taking water directly from natural streams. . . . . Neither the title nor a salable interest in the water of natural streams vests in the carrier [the company] by means of his diversion or carriage thereof," etc. After considering authorities,

[9] (1888), 10 Colo. 582, 3 Am. St. Rep. 603, 17 Pac. 487.

[10] (1889), 13 Colo. 111, 21 Pac. 1028, 4 L. R. A. 767.

"From these opinions the conclusion seems inevitable that the 'better right' acquired by priority of appropriation is applicable to individual consumers as between themselves when they receive the water through the agency of an artificial stream as well as when they receive the same direct from the natural stream," etc. Carriers, as between themselves, are only "*quasi* appropriators" as against other carriers; and not even that as between company and consumer. Helm, C. J., concurring in the judgment only, said: "By taking from its canal the consumer recognizes and ratifies its acts of construction and diversion, making them his own, and the situation, so far as this question is concerned, is not different from what it would have been had the consumer in fact employed the carrier to construct the canal for himself alone," and speaks of the consumer making thereby a "constructive diversion" from the natural stream. The view is thus squarely taken by the case that a public service irrigation company does not own any water-right, but is purely a representative of its consumers, who are the real proprietors of the flow and use of the stream from which the supply is drawn.

In Combs v. Agricultural D. Co.[11] the opinion rests upon the same principle. It was held that a company in public service (as distinguished from a purely mutual company) could not force a consumer to buy shares of stock before receiving water, which would have been equally true under the common-law rule of compulsory service; but the decision was rested on the Colorado constitutional provision that "priority of appropriation" gives the better right, which appropriation can vest only in the consumers who alone make the beneficial use, and who cannot be denied the right given by the constitution to acquire rights in the streams of the State. The consumers from the company's ditch were regarded as on a par in ownership, with appropriators from natural streams.

The case in which this finds its most definite expression is Wyatt v. Larimer etc. Co.[12] As first decided in the court of appeals,[13] it was held that the water-rights in the stream belong wholly to the company, and in effect that it merely performs service and delivers specific particles of water (the *corpus* as distinguished from

[11] (1892), 17 Colo. 146, 31 Am. St. Rep. 275, 28 Pac. 966.

[12] (1893), 18 Colo. 298, 36 Am. St. Rep. 280, 33 Pac. 144.

[13] 1 Colo. App. 480, 29 Pac. 906.

a *usufruct)*[14] to the consumer as it actually enters the consumer's ditch; that above the head of the consumer's ditch the consumer has no property right whatever, saying *inter alia:* "Later decisions of the supreme court seem at variance with the leading case [Wheeler v. Northern Irr. Co.] and seem to sustain our contention that, by appropriation, diversion and application to a beneficial use, the canal company, the appropriator, has a proprietary right to the water diverted." This opinion (in the court of appeals) is intemperate in its criticism of the upper court, and was reversed on appeal, the supreme court adhering to its former view and strengthening it. The supreme court said that upon the facts only a contract was involved, but, because of the attitude of the court of appeals, proceeded to lay down the law of the status of companies and consumers generally, aside from contract. Mr. Justice Goddard says: "That a valid appropriation of water from a natural stream constitutes an easement in the stream, and that such easement is an incorporeal hereditament, the appropriation being in perpetuity, cannot well be disputed." He refers to the discussion of property in water by Washburn in his work on Easements and Servitudes,[15] and Angell on Watercourses,[16] and adds: "The right acquired to water by an appropriator under our system is of the same character as that defined by the foregoing authorities as an incorporeal hereditament and easement. The consumer under a ditch possesses a like property. He is an appropriator from the natural stream, through the intermediate agency of the ditch, and has the right to have the quantity of water so appropriated flow in the natural stream, and through the ditch for his own use." And elsewhere in the same case: "We adhere to the doctrine that such a canal company is not the proprietor of the water diverted by it, but that it must be regarded as an intermediate agency existing for the purpose of aiding consumers in the exercise of their constitutional rights, as well as a private enterprise prosecuted for the benefit of its owners."

Accordingly, it is customary in the Colorado opinions to call consumers from a distributing ditch "appropriators," to denote ownership, like those diverting from the stream itself, and to give them all the rights and remedies of ownership that have been worked out for owners in natural streams. A recent case[17] puts

[14] *Supra*, secs. 2 et seq., 62.
[15] Page 276.
[16] Sec. 141.
[17] Farmers' etc. Co. v. New Hampshire etc. Co., 40 Colo. 467, 92 Pac. 290.

it: "It hardly seems necessary to again state, as this court so often has stated, that the perpetual right to have water carried by a ditch constitutes an easement in the ditch."[18] In other cases it is said: "A perpetual right to the use of water from an irrigating ditch, acquired or reserved under contract, constitutes an easement in the ditch, which cannot be lost by nonuser alone, short of the period of limitation for actions to recover such property."[19] And again, "His contract with the company [carrier] is not the purchase of a given volume of water, but the purchase of the right to use the canal as a means to conduct a given volume, or so much thereof as may be necessary to irrigate a certain number of acres."[20]

(3d ed.)

§ **1341. Same—Continued.**—In a Nebraska case it is said:[21] "The doctrine of private ownership of water for irrigation purposes, disassociated from the land to which it is designed to be applied, has been proved by long experience to be detrimental to the public welfare. . . . . The other doctrine is that *the right to the use of water should never be separated from the land to which it is to be applied.* Where this doctrine prevails, canals and ditches become, like railroads, great semi-public utilities, means of conveyance of a public commodity, their owners entitled to adequate compensation for services rendered, *but having no ownership in the property distributed.*[22] . . . . *The irrigation company does not own the water;* it is only the servant of the public to *carry* it to the land for which it has been appropriated." As to the relative status of the company and consumer, this is mostly *dictum;* it was, however, actually applied in holding that a company can acquire no water-rights under this view without specifically designating the lands to be irrigated and which alone will own the water-rights when irrigation has begun; also saying as *dictum* that water-rights can only be abandoned by the irrigators, and nonuse by the company against the irrigators' protest is not

[18] *Quaere,* whether there can be such a thing as an easement in an easement. Cf. City of Denver v. Walker, 45 Colo. 387, 101 Pac. 348, holding that one having a contract right to take water from another's ditch is not an "appropriator" so as to have any independent right as such.

[19] People ex rel. Standart v. Canal etc. Co., 25 Colo. 213, 54 Pac. 626.

[20] Wright v. Platte Val. Irr. Co., 27 Colo. 329, 61 Pac. 603.

[21] Farmers' Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. 286 (italics ours).

[22] Pages 286, 287 of 100 N. W.

equivalent (in regard to abandonment) to nonuse of a water-right; a rule of compulsory service equally applicable if the company is regarded as the owner of the water, but arrived at in the other way. The matter as to a consumer (and not the company) being the real appropriator and owner of the water-right (the company being a mere agent to carry the water) did not enter much into the actual decision, but it entered strongly into the spirit of the opinion, and is the view of the law generally to be gathered from the case.

It is very strongly laid down in Arizona. In one case[23] it was held "that such canal company was *not itself an appropriator of water,* and that neither it, therefore, nor its shareholders, as such, possessed any power of control or any right of disposition over the water diverted and carried, save to transport and deliver the same to appropriators entitled to it under the law of prior appropriation," etc. . . . . The water diverted and carried by the company "was the subject of appropriation to the same extent and in the same manner *as when it flowed in the channel of the Salt River.* . . . . Since, as stated in the Slosser case, a canal company organized for the purpose of the diversion and carriage of water for irrigation, and not being the owner of arable and irrigable land, is not an appropriator of water, it follows that the diversion of public water would be unlawful were the *consumers* of such water not *appropriators in the fullest sense.* . . . . It follows, therefore, that all persons owning lands under the flow of such a canal which have been irrigated by means of water furnished by such canal become appropriators and possessed of rights of appropriation in the order of their priority." It was, *inter alia,* actually held that a consumer could change his point of diversion from a point on the main stream to a point on the company's canal —the two are equivalent, it was held.[24]

In Idaho this view was taken in Hard v. Boise etc. Co.,[25] holding that a consumer may, as on a par with an appropriator from the natural stream, change his point of diversion and use without the company's consent. Respondent contended "that the user has no property interest in the water which he has taken from the re-

[23] Gould v. Maricopa etc. Co. (1904), 8 Ariz. 429, 76 Pac. 598.

[24] The case affirms Slosser v. Salt River Co., 7 Ariz. 376, 65 Pac. 332, which took much the same view. The Colorado cases were not cited, though probably the basis of the opinion.

[25] (1904), 9 Idaho, 589, 76 Pac. 331, 65 L. R. A. 407.

spondent's canal," but the court held, "we cannot give our consent to this proposition." Mr. Justice Ailshee, concurring, says: "I can see no more reason for denying this right of sale and disposition to a settler under a ditch, than for denying it to the settler under the natural stream." This view of the consumer's status as on a par in ownership with the stream owners cannot, however, be said to be definitely settled in the Idaho decisions. In the case just cited, Mr. Justice Sullivan, in a separate opinion, pointed out the view that the consumer was not an appropriator, but a member of the public dealing with a public service corporation. The result as between the consumer and the company would have been the same on the latter treatment (so far as compulsory service was involved), and the opinion of Sullivan, J., points out the distinction between a derivative rental right from year to year against a company to receive water from its canal, and a perpetual right in the flow of a natural stream, by original acquisition. And other recent Idaho cases tend to either view of the consumer's status.[1]

A New Mexico case uses the expression that a canal company is only an "intermediate agency," quoting the Colorado cases.[2] The actual question was only one of eminent domain, no consumers being involved, and on the whole the attitude is rather that the company is the owner of the water-rights.[3]

[1] For example, a water company's contract was entitled "water deed," and stipulated that the ditch company sells and conveys to each of the parties "the right to use water flowing through the canal of said company on the tract of —— acres hereinbefore mentioned; the quantity of water represented by said right being all that is necessary to irrigate said land," etc. *Held*, a suit to enforce delivery of water and for determination of quantity to which each is entitled is not a suit over a water-right —is not a "water suit" to settle water-rights—but is a dispute only over contract rights. "It does not involve carrying water through the ditch; it only involves the quantity to be delivered to each of the plaintiffs." Priority of right is not involved. Creer v. Bancroft W. Co., 13 Idaho, 407, 90 Pac. 228. But in a later Idaho case it is held that a contract with a public service company conveys an actual "water-right" (*semble*), and when the company has made contracts to the full capacity of its plant, it has wholly conveyed away its water-rights and then is "without any further interest in the canal or water-right." Nampa etc. Irr. Dist. v. Gess (1910), 17 Idaho, 552, 106 Pac. 993. An Idaho statute says that when a contract grants a "perpetual right," "said water-right shall forever remain a part of said tract of land." Idaho Rev. Codes, sec. 3292.

[2] Albuquerque etc. Co. v. Gutierrez (1900), 1 N. M. 177, 61 Pac. 357; S. C., 188 U. S. 545.

[3] See Hagerman Co. v. McMurray (N. M.), 113 Pac. 823, saying: "Gutierres v. Albuquerque L. & I. Co., *supra*, is also conclusive against the appellant's contention that the appellee, because of its being a corporation and a mere purveyor of water to be used on the lands of others, had not the right to appropriate the water in question."

In Wyoming (and Oregon, following Wyoming) the statutes provide that "certificates of appropriation" shall issue to the consumers from the State Engineer, just as to the company (those issued to the company being called "primary or reservoir permits," and those issued to the consumers being called "secondary permits"), and consumers from a canal must make application to the State Engineer as "appropriators" from the natural stream desiring a private water-right.[4] The State Engineer of Wyoming (Mr. Johnston) says: "The laws of Wyoming recognize ditches and canals as common carriers.[5] While it might, in theory, be considered possible for a canal to be successfully conducted as a common carrier, yet the history of the West and all the experience of irrigation authorities teach that unless the water user can obtain a permanent interest in the irrigation works in proportion to his water-right, failure can be confidently anticipated."[6] And "It would seem much better to make the water-rights attach to the land and establish the price which the water user is to pay *for an interest in the irrigation works* in the beginning."[7] The State Engineer of Oregon (Mr. Lewis) says: "Water having been made appurtenant to land puts an end to the ownership of water by corporations and its sale for a yearly rental to those who use it. No more common carrier canals will therefore be constructed. Only water-rights which convey a proportional interest in the franchises and works can be sold by those who appropriate water in excess of their needs."[8]

(3d ed.)

§ 1342. **Same—Continued.**—There has been extensively used a plan of promotion expressly providing in the consumers' contracts that they, as a body, shall be entitled to an actual conveyance of the canal and water system when their number reach the capacity of the canal; and thereby they become part owners in the company without its being considered merely a "mutual" company.[9] Its direct result is, consequently, public ownership; the

[4] Wyo. Laws 1903, c. 69, sec. 2; Or. Stats. 1909, c. 216, sec. 58. See Cookinham v. Lewis (Or.), 114 Pac. 88. But they need not so apply in Colorado, *semble*, Water Supply Co. v. Larimer Co. (Colo.), 51 Pac. 496. Compare *infra*, sec. 1382, note 11.

[5] Rev. Stats. 1899, sec. 895, as amd. by chapter 86, S. L. 1907.

[6] Report for 1907–8, p. 59.

[7] Wyo. St. Engr. 1909–10, p. 21.

[8] Report for 1909–10, p. 25.

[9] Wyatt v. Larimer Co., 18 Colo. 298, 36 Am. St. Rep. 280, 33 Pac. 144; Blakeley v. Ft. Lyon Co., 31 Colo. 224, 73 Pac. 249; Water Supply Co. v. Larimer etc. Co., 24 Colo. 322, 51 Pac. 496, 46 L. R. A. 322;

consumers becoming actual part owners of the system. A conveyance of the system to them will be enforced.[10]

(3d ed.)

§ **1343. Results of the Rule—Priorities.**—The chief result of this view which has given rise to litigation is that consumers, being appropriators from the natural stream, have different priorities among themselves, thereby letting in the various inequalities among consumers that result from the law of appropriation. Much litigation has arisen over whether they shall be made to suffer ratably in times of deficiency or whether prior consumers have a paramount right to their full supply.[11]

Provisions in contracts providing for pro-rating shortage in spite of priorities are much the usual practice. They will be enforced, as a voluntary waiver of priorities.[12]

But in the absence of contract enforcing pro-rating, prior consumers are held to have a paramount right to their full supply in time of deficiency.[13] Statutes, it appears, cannot impose pro-rating against the consumer's will, being a violation of the constitutional guaranty of priority among appropriators, the consumers being held to be appropriators from the natural resource. A statute in Colorado provided for such pro-rating,[14] but, while the Colorado law upon the point remains uncertain, it appears that the statute is regarded as unconstitutional.[15]

Broadmoor etc. Co. v. Brookside etc. Co., 24 Colo. 541, 52 Pac. 792; La Junta Co. v. Hess, 6 Colo. App. 497, 42 Pac. 50; Idaho etc. Co. v. Great Western etc. Co., 18 Idaho, 1, 107 Pac. 989.

[10] La Junta Co. v. Hess, 6 Colo. App. 497, 42 Pac. 50. It is said to be authoritatively settled in Colorado in this connection that "capacity of ditch" means the ability of the canal to supply or deliver water, and that in determining this question there must be taken into consideration not only the physical capacity of the canal, but the volume of its decreed priorities, in connection with the probability of obtaining water from the stream supplying them under normal conditions during the season of irrigation. Cases *supra*.

[11] See *supra*, sec. 1284.

[12] Jackson v. Indian etc. Co. (1909), 16 Idaho, 430, 101 Pac. 814; Same v. Same, 18 Idaho, 513, 110 Pac. 251; Souther v. San Diego Co., 121 Fed. 347, 57 C. C. A. 561; O'Neil v. Fort Lyon etc. Co., 39 Colo. 487, 90 Pac. 849; Creer v. Bancroft etc. Co., 13 Idaho, 407, 90 Pac. 228.

[13] Hargrave v. Hall (1891), 3 Ariz. 252, 73 Pac. 400; Slosser v. Salt River Co., 7 Ariz. 376, 65 Pac. 332; Gould v. Maricopa etc. Co., 8 Ariz. 429, 76 Pac. 598. Cf. Farmers' Co. v. Riverside Irr. Dist., 14 Idaho, 450, 94 Pac. 761.

[14] Laws 1879, p. 97, sec. 4; Gen. Stats., sec. 1722.; Rev. Stats. 1908, sec. 3175.

[15] Farmers' etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. 1028, 4 L. R. A. 767; Same v. White, 32 Colo. 114, 75 Pac. 415. "'The appropriations of water by consumers who receive the same through the same ditch do not necessarily relate to the same time; but, on the contrary, such consumers

In Idaho it is provided by the constitution that priority shall govern among consumers in the absence of statute, but that the legislature may by statute pass special rules for times of scarcity.[16]

(3d ed.)

§ 1344. **Same.**—On the other hand, in the absence of this view that consumers have rights of ownership as appropriators, consumers are on an equality and have no priority. Having all, if not regarded as owners, a simple right of service, in time of deficiency they must share ratably the loss, as must consumers from gas companies, for example. To prefer one to another and give him priority in service would be discrimination against the others; and the law of public service prohibits discrimination among consumers. Consequently, where the consumer is not considered an appropriator, priorities among consumers are not recognized, but they are placed on an equality regardless of the relative time of beginning use. In times of drought, consumers share ratably, and the company has no right to prefer some over others; which is but an obvious application of familiar principles to the relation of the parties.[17]

(3d ed.)

§ 1345. **Parties to Actions.**—The question has also given rise to some confusion in Colorado in respect to parties to actions. The canal company will be regarded as itself an appropriator for the purposes of suit against it,[18] and may bring suit as appropriator against a wrongdoer without the consumers being necessary parties.[19] On the other hand, a consumer may himself as appropriator enjoin a diversion without the corporation being a neces-

may have different priorities of right.' Thus, in effect, the pro-rating statute, so-called (Gen. Stats. 1883, sec. 1722), was, upon constitutional grounds, limited in its operation." Nichols v. McIntosh, 19 Colo. 36, 34 Pac. 278. "The most favorable view that can be taken of the statute is that in times of scarcity of water it may be resorted to to compel the pro-rating of water among consumers having priorities of the same, or nearly the same, date." Larimer & Weld Irr. Co. v. Wyatt, 23 Colo. 491, 48 Pac. 523.

[16] Idaho Const., art. 15, sec. 5. See Rev. Codes, sec. 3290.

[17] *Supra,* secs. 1283, 1284. See especially Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404.

[18] Farmers' etc. Co. v. Agricultural etc. Co., 22 Colo. 513, 55 Am. St. Rep. 149, 45 Pac. 444.

[19] Town of Sterling v. Pawnee Co., 42 Colo. 421, 94 Pac. 339, 15 L. R. A., N. S., 238; Montrose etc. Co. v. Loutsenhizer, 23 Colo. 233, 48 Pac. 532; Farmers' etc. Co. v. Agric. etc. Co., 22 Colo. 513, 55 Am. St. Rep. 149, 45 Pac. 444. See Conrad Inv. Co. v. United States, 161 Fed. 829, 88 C. C. A. 647.

sary party,[20] or may bring an action to quiet title to his water-right against the company.[21] When sued the defendant company and its grantors are trustees for the stockholders and consumers, and bound to protect the interests of all in determining priorities.[22]

The consumer-appropriators are held to have no such community of interest as to allow joinder in a suit for specific performance against the water company.[23]

The corporation represents the stockholders for the purpose of suits against other corporations taking water,[24] but not for a suit to prevent one consumer being forced to pro-rate with the others. Such a suit must be brought against the other consumers.[25]

The canal company is alone the proper party in proceedings for determination of priorities.[1]

The supreme court of the United States holds that a judgment against the distributor-appropriator will bind consumers whether they be regarded as themselves appropriators and owners of the natural resource, or whether regarded as having only a right of service.[2]

(3d ed.)

§ **1346. Changes of Use.**—Questions of change of mode of use by the consumer are worked out on the basis of his having all the rights in that respect of appropriators from the natural stream;[3] that is, the only limitation is whether the rights of others are injured by the change; the company cannot object. A consumer may, without losing priority, change his point of diversion from a point on the main stream to a point on the company's canal, the two being held equivalent,[4] or from one point on the canal to

20 Clifford v. Larrieu, 2 Ariz. 202, 11 Pac. 397.

21 Kimball v. Northern Irr. Co., 42 Colo. 412, 94 Pac. 333.

22 Supply Ditch Co. v. Elliott, 10 Colo. 327, 3 Am. St. Rep. 586, 15 Pac. 691; Farmers' Ditch Co. v. Agricultural Ditch Co., 22 Colo. 513, 55 Am. St. Rep. 149, 45 Pac. 444; Montrose Canal Co. v. Loutsenhizer Ditch Co., 23 Colo. 233, 48 Pac. 532; O'Neil v. Ft. Lyon etc. Co., 39 Colo. 487, 90 Pac. 849.

23 Creer v. Bancroft Water Co., 13 Idaho, 407, 90 Pac. 228.

24 Combs v. Farmers' etc. Co., 38 Colo. 420, 88 Pac. 396. But see Montezuma Co. v. Smithville Co., 11 Ariz. 99, 89 Pac. 512.

25 Farmers' etc. Co. v. White, 32 Colo. 114, 75 Pac. 416.

1 *Supra*, sec. 1229.

2 Montezuma Co. v. Smithville Co. (Ariz.), 218 U. S. 371, 31 Sup. Ct. Rep. 67, 54 L. Ed. 1074, citing the second edition of this book.

3 *Supra*, sec. 496 et seq.

4 Gould v. Maricopa Co., 8 Ariz. 429, 76 Pac. 598.

another.[5] Likewise he can change his place of use to different land, or resell the water for use on different land.[6]

(3d ed.)

§ 1347. **Conclusion.**—Some confusion has thus arisen from regarding the consumers as appropriators of the natural resource, with rights of part ownership in the supplying streams and distributing system. The matter is now in course of development, with the probability that it is making rapidly toward public ownership of distributing systems.

[5] Knowles v. Clear etc. Co., 18 Colo. 209, 32 Pac. 279; Hard v. Boise etc. Co., 9 Idaho, 589, 76 Pac. 331, 65 L. R. A. 407.

[6] Knowles v. Clear etc. Co., 18 Colo. 209, 32 Pac. 279; Hard v. Boise etc. Co., 9 Idaho, 589, 76 Pac. 331, 65 L. R. A. 407. But see Slosser v. Salt River Co. (1901), 7 Ariz. 376, 65 Pac. 332, holding sales only for *temporary* use improper. See, also, Mont. Civ. Code, sec. 1900, to the effect that a consumer *cannot* resell after use.

§§ *1348–1355. (Blank numbers.)*

CHAPTER 58.

IRRIGATION DISTRICTS.

§ 1356. Purpose.
§ 1357. California.
§ 1358. Operation of the system in California.
§ 1359. Colorado.
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§ 1361. Kansas.
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§§ 1372–1379. (Blank numbers.)

(3d ed.)

§ 1356. Purpose.—The "irrigation district" system is an express recognition of the doctrine of public ownership of irrigation works. The object of the legislation authorizing the organization of irrigation districts is to enable owners of lands susceptible of irrigation from a common source and by the same system of works to form a district composed of such lands and conduct the irrigation under public auspices. The district, when formed, is a public corporation for the sole purpose of obtaining and distributing such water as may be necessary for the irrigation thereof, thus enabling each one to have for his land in the district the benefit of a common system of irrigation under public ownership, and bringing about the reclamation of the land of the district from aridity to a condition of suitability for cultivation. It was recognized that without such a common system the individual landowners might be unable to obtain water for the irrigation of their lands. A work which would be for the public benefit and general welfare, viz., the reclamation from aridity of large portions of the lands of the State, might never be accomplished if left to indi-

vidual enterprise. The irrigation district legislation, under which a public municipal corporation may be created for the purpose of furnishing water for the irrigation of the land within the district, has been sustained upon the same ground as has the levee and reclamation district legislation. This is, in effect, that the land included within the limits of such a district requires, by reason of its situation and condition, the protection or reclamation thus made possible, and that it is for the public welfare that such protection or reclamation should be afforded such land.[1]

The Wright Act of California, while never doubted in the State court, was early held unconstitutional by Judge Ross in the United States circuit court for the southern district of California,[2] but the supreme court of the United States reversed this decision on appeal.[3] The constitutionality of the principle is now well settled.

The supreme court of the United States, in Fallbrook Irr. Dist. v. Bradley, *supra,* said: "To provide for the irrigation of lands in States where there is no color of necessity therefor within any fair meaning of the term . . . . might be regarded by courts as an improper exercise of legislative will, and the use might not be held to be public in any constitutional sense, no matter how many owners were interested in the scheme. On the other hand, in a State like California, which confessedly embraces millions of acres of arid lands, an act of the legislature providing for their irrigation might well be regarded as an act devoting the water to a public use, and therefore as a valid exercise of the legislative power. The people of California and the members of her legislature must, in the nature of things, be more familiar with the facts and circumstances which surround the subject, and with the necessities and the occasion for the irrigation of the lands, than can anyone be who is a stranger to her soil. This knowledge and familiarity must have their due weight with the State courts which are to pass upon the question of public use in the light of the facts which surround the subject in their own State. . . . . The use for which private property is to be taken must be a public use, whether the taking be by the exercise of the right of eminent domain or by that of taxation. . . . . While the consideration that the work of irrigation must be abandoned if the use of the water may not be

[1] Mr. Justice Angellotti in Jenison v. Redfield, 149 Cal. 500, 87 Pac. 62.

[2] Bradley v. Fallbrook Irr. Dist., 68 Fed. 948.

[3] Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. Rep. 56, 41 L. Ed. 369.

held to be or constitute a public use is not to be regarded as conclusive in favor of such use, yet that fact is in this case a most important consideration. Millions of acres of land otherwise cultivable must be left in their present arid and worthless condition, and an effectual obstacle will therefore remain in the way of the advance of a large portion of the State in material wealth and prosperity. To irrigate, and thus to bring into possible cultivation these large masses of otherwise worthless lands, would seem to be a public purpose, and a matter of public interest not confined to the landowners, or even to any one section of the State. The fact that the use of the water is limited to the landowner is not therefore a fatal objection to this legislation. It is not essential that the entire community, or even any considerable portion thereof, should directly enjoy or participate in an improvement in order to constitute it a public use. . . . . If it be essential or material for the prosperity of the community, and if the improvement be one in which all the landowners have to a certain extent a common interest, and the improvement cannot be accomplished without the concurrence of all, or nearly all, of such owners by reason of the peculiar natural condition of the tract sought to be reclaimed, then such reclamation may be made, and the land rendered useful to all, and at their joint expense. In such case the absolute right of each individual owner of land must yield to a certain extent, or be modified by corresponding rights on the part of other owners for what is declared upon the whole to be for the public benefit."

(3d ed.)

§ **1357. California.**—An outline of the present California statute is given in the statutes hereafter.

Before the enactment of the Wright Act, legislation existed for the formation of "reclamation districts" to reclaim swamp lands,[4] and an early case upholding the constitutionality of those acts contained a *dictum* that such law could be passed also for the formation of districts to irrigate lands.[5] In 1872 the legislature passed an act upon similar lines,[6] providing that owners of land susceptible of one mode of irrigation may join in the formation of a corporation for the common purpose, contributing the water-right owned by each, or acquiring new ones in the usual ways. In

[4] *Supra*, sec. 350.

[5] Hagar v. Board of Supervisors, 47 Cal. 222.

[6] Stats. 1871–72, pp. 945–948.

1887[7] the act well known as the Wright Act was passed, an elaborate statute providing for the formation of *quasi* municipal corporations for this purpose.[8]

The Wright Act is constitutional.[9] It is legislation for a public purpose.[10] The Confirmatory Act, added to the Wright Act to establish validity of bonds and organization, is also constitutional.[11] Irrigation districts may take property by eminent domain.[12] The district holds its property as trustee for the landowners,[13] and exempt from sale on execution, being held in trust for public uses, which, it was also held, prevented even the directors from voluntarily selling lands which, from change of plans, had become unnecessary to the irrigation scheme.[14] But the next session of the legislature amended the law so as, at least, to give the directors power to sell such property.[15] An irrigation district may control and manage property merely as agent of water owners, without having any interest in the water-rights.[16]

The notice of petition for organization of an irrigation district and the petition itself may be embodied in a single document, the original of which, after publication, may be filed with the board of supervisors as a petition. Where, to get the statutory number of freeholders signing a petition for an irrigation district, dummies are used, to whom realty is conveyed, to be reconveyed after the organization is completed, this is fraud, and sufficient cause for declaring the organization invalid in the confirmatory proceedings. Where not presented in such proceedings, however, and a decree of confirmation rendered, the fraud only renders the organization

7 Stats. of March 7, 1887.

8 Repealed in 1897 and a new similar act—sometimes called the Bridgford Act—substituted, which has been since amended. See statutes, *infra*, sec. 1432.

9 Turlock Irr. Dist. v. Williams, 76 Cal. 360, 18 Pac. 379; Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. 825 (relying on reclamation district cases); Crall v. Poso Irr. Dist., 87 Cal. 140, 26 Pac. 797; In re Madera Irr. Dist., 92 Cal. 296, 27 Am. St. Rep. 106, 28 Pac. 272, 14 L. R. A. 755 (relying on reclamation district cases); Fallbrook Irr. Dist. v. Bradley, 164 U. S. 161, 17 Sup. Ct. Rep. 56, 41 L. Ed. 369.

10 In re Madera Irr. Dist., 92 Cal. 296, 27 Am. St. Rep. 106, 28 Pac. 272, 14 L. R. A. 755.

11 Crall v. Poso Irr. Dist., 87 Cal. 140, 26 Pac. 797; Board of Directors v. Tregea, 88 Cal. 334, 26 Pac. 237; In re Madera Irr. Dist., 92 Cal. 296, 27 Am. St. Rep. 106, 28 Pac. 272, 14 L. R. A. 755.

12 Turlock Irr. Dist. v. Williams, 76 Cal. 360, 18 Pac. 379; Lindsay Irr. Dist. v. Mehrtens, 97 Cal. 679, 32 Pac. 802.

13 Merchants' Bank v. Escondido Irr. Dist., 144 Cal. 329, 77 Pac. 937.

14 Tulare Irr. Dist. v. Collins (1908), 154 Cal. 440, 97 Pac. 1124.

15 Stats. 1909. c. 698.

16 *Semble*, Strong v. Baldwin, (1908), 154 Cal. 150, 129 Am. St. Rep. 149, 97 Pac. 178.

voidable, and does not affect the jurisdiction of the court to give the decree, nor render the organization absolutely void; nor even voidable against bondholders who advanced money without notice of the fraud.[17] The records in the county recorder's office of the organization proceedings are notice to the world of the contents thereof, such as the boundaries of the district.[17] Since this decision, the statute upon these matters has been amended.[18]

The court has several times passed upon and construed the provisions for proceedings on organization, the inclusion and exclusion of land, and the issuance of bonds.[19] The confirmatory decree establishing that the organization and the bonds are valid is a judicial proceeding,[20] and is a decree *in rem* binding upon the whole world.[21] *Quo warranto* by the attorney general will not lie to declare the organization invalid after the confirmatory decree has been rendered, for it is a collateral attack upon the confirmatory decree.[22] But the confirmatory decree may be opened in direct attack on the ground of fraud.[23] Fraud in procuring a confirmatory decree may be cured by a second confirmatory decree, at least as to bondholders taking bonds intervening the two decrees.[24] A second confirmatory decree cannot cure a prior one which was absolutely void *ab initio* for want of jurisdiction.[25] A decree confirming the validity of bonds necessarily involves and requires an inquiry into the validity of the original organization of the district.[1]

17 Fogg v. Perris Irr. Dist. (1908), 154 Cal. 209, 97 Pac. 316.

18 Stats. 1909, c. 22.

19 Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. 825; Board of Directors v. Tregea, 88 Cal. 334, 26 Pac. 237; S. C., 164 U. S. 179, 17 Sup. Ct. Rep. 52, 41 L. Ed. 395; In re Madera Irr. Dist., 92 Cal. 296, 27 Am. St. Rep. 106, 28 Pac. 272, 14 L. R. A. 755; Cullen v. Glendora W. Co., 113 Cal. 503, 39 Pac. 769, 45 Pac. 822; In re Central Irr. Dist., 117 Cal. 382, 49 Pac. 354 (distinguishing De Lappe case); Chinn v. San Joaquin County Superior Court, 156 Cal. 478, 105 Pac. 580; Stowell v. Rialto Irr. Dist., 155 Cal. 215, 100 Pac. 248.

20 Title etc. Co. v. Kerrigan, 150 Cal. 320, 119 Am. St. Rep. 199, 88 Pac. 356.

21 Board of Directors v. Tregea, 88 Cal. 334, 26 Pac. 237; S. C., 164 U. S. 179, 17 Sup. Ct. Rep. 52, 41 L. Ed. 395; In re Madera Irr. Dist., 92 Cal. 296, 27 Am. St. Rep. 106, 28 Pac. 272, 14 L. R. A. 755; Rialto Irr. Dist. v. Brandon, 103 Cal. 384, 37 Pac. 484; Directors v. Abila, 106 Cal. 365, 39 Pac. 793; Cullen v. Glendora W. Co., 113 Cal. 503, 39 Pac. 769, 45 Pac. 822.

22 People v. Selma Irr. Dist., 98 Cal. 206, 32 Pac. 1047; People v. Linda Vista Irr. Dist., 128 Cal. 477, 61 Pac. 86 (a leading case upon the nature of the confirmatory decree); People v. Perris Irr. Dist., 132 Cal. 289, 64 Pac. 399 (affirming Linda Vista case); People v. Perris Irr. Dist., 142 Cal. 601, 76 Pac. 381.

23 People v. Perris Irr. Dist., 142 Cal. 601, 76 Pac. 381.

24 Fogg v. Perris Irr. Dist. (1908), 154 Cal. 209, 97 Pac. 316.

25 *Ibid.*

1 *Ibid.*

The decisions of the board of supervisors in including and excluding land and similar matters on organization are held conclusive upon the courts.[2] *Mandamus* will, however, lie to order the board of supervisors to create a district if the facts are so clear as to leave no room for discretion.[3] An order of board of supervisors in including or excluding land from irrigation districts can only be tested by *mandamus, certiorari,* or similar writs. It cannot under the California constitution be by direct appeal.[4] Where certain landowners object to entering a certain district and want a separate one of their own, and the facts warranting such course are so clear as to leave no room for discretion, *mandamus* will lie to make the board of supervisors form them into the new district demanded.[5]

In the confirmatory proceedings the directors have the burden of proving the validity of the organization and of the bonds,[6] and the statutory checks upon the creation of bond liens by the board of directors should be strictly enforced.[7] The landowner must be afforded due process of law in the issuance of bonds and the creation of liens upon his land.[8]

Assessments may be levied and enforced.[9] When the directors refuse to make the levy, *mandamus* lies by the bondholders against the board of supervisors to force the supervisors to make the levy[10] (though bondholders do not find this much practical satisfaction). Poles, wires, etc., of the Western Union Telegraph Company within the irrigation district are not assessable by the district. They are easily removable, and in no sense essential to the support of that to which they are attached, and are not real property within the meaning of the irrigation district law, but are personal property, not assessable for the revenue purposes of the district.[11]

2 Board of Directors v. Tregea, 88 Cal. 334, 26 Pac. 237; S. C., 164 U. S. 179, 17 Sup. Ct. Rep. 52, 41 L. Ed. 395.

3 Inglin v. Hoppin (1909), 156 Cal. 483, 105 Pac. 582; Chinn v. Superior Court (1909), 156 Cal. 478, 105 Pac. 580.

4 *Ibid.*

5 *Ibid.*

6 Directors v. Abila, 106 Cal. 365, 39 Pac. 793.

7 Cullen v. Glendora W. Co., 113 Cal. 503, 39 Pac. 769, 45 Pac. 822.

8 Merchants' Bank v. Escondido Irr. Dist., 144 Cal. 329, 77 Pac. 937.

9 Tregea v. Owens, 94 Cal. 317, 29 Pac. 643; Hughson v. Crane, 115 Cal. 404, 47 Pac. 120, affirmed in Boskowitz v. Thompson, 144 Cal. 724, 78 Pac. 290; Baxter v. Vineland Irr. Dist., 136 Cal. 185, 68 Pac. 601; Best v. Wohlford, 153 Cal. 17, 94 Pac. 98.

10 Nevada Bank v. Board of Supervisors, 5 Cal. App. 638, 91 Pac. 122.

11 Western Union etc. Co. v. Modesto Irr. Dist., 149 Cal. 662, 87 Pac. 190, 9 Ann. Cas. 1190.

The districts are public corporations,[12] and political subdivisions of the State,[13] and *mandamus* lies by the bondholders to enforce payment of bonds.[14] *Mandamus* will lie to make the district keep its works in repair.[15] Bids are required in regard to work.[16] Dissolution must not affect the validity of the bonds.[17]

A landowner within the district may have a paramount private water-right acquired before the district was organized,[18] and an irrigation district may serve such rights, and may serve even outside lands if they received water from the same works before organization of the district.[19] But a landowner within a district whose only right is as a member thereof has no distinct title to a specific share of the water such as to entitle him to use it outside the district, and the fact that for over five years (the prescriptive period) he had been so using the water under claim of right gave him no right to continue it.[20] In this case just cited the objects of the statute are generally discussed by Mr. Justice Angellotti. "The ultimate purpose of a district organized under the Irrigation Act is the improvement, by irrigation, of the lands within the district. It can, under the law, be organized and exist and acquire property only for such purpose. This, we think, is so clearly apparent as not to require further discussion here. Such a district holds all property acquired by it solely in trust for such ultimate purpose, and can divert it to no other use. (See sec. 29 of the Act of 1897, Stats. 1897, p. 263.) It has to do solely with the irrigation of lands within the district, and cannot appropriate water to any other purpose. The right of a landowner of the district to the use of the water acquired by the district is a right to be exercised in consonance with and in furtherance of such ultimate purpose, viz., for the improvement by irrigation of lands within the district, and in no other way. His right is always in subordina-

[12] Crall v. Poso Irr. Dist., 87 Cal. 140, 26 Pac. 797; People v. Turnbull, 93 Cal. 630, 29 Pac. 224.

[13] Fogg v. Perris Irr. Dist. (1908), 154 Cal. 209, 97 Pac. 316.

[14] Hewel v. Hogin, 3 Cal. App. 248, 84 Pac. 1003.

[15] McPherson v. Alta Irr. Dist. (Cal. App.), 112 Pac. 193.

[16] Healey v. Anglo etc. Bank, 5 Cal. App. 278, 90 Pac. 54.

[17] Herring v. Modesto Irr. Dist., 95 Fed. 705. Regarding bonds of *de facto* district, see Haese v. Heitzig (Cal.), March 16, 1911; regarding power to negotiate in advance of organization, see Stowell v. Rialto Irr. Dist., 155 Cal. 215, 100 Pac. 248; procedure to issue bonds and term thereof, see Stowell v. Rialto Irr. Dist., 155 Cal. 215, 100 Pac. 248.

[18] Walnut Irr. Dist. v. Burke, 158 Cal. 165, 168, 110 Pac. 518.

[19] South Pasadena v. Pasadena Co., 152 Cal. 590, 93 Pac. 490 (*dictum*), citing Hewitt v. San Jacinto Irr. Dist., 124 Cal. 192, 56 Pac. 893.

[20] Jenison v. Redfield, 149 Cal. 500, 87 Pac. 62.

tion to the ultimate purpose of the trust. So far as he proposes to use the water for the irrigation of lands within the district, he is proposing to use it in furtherance of the purpose of the trust, and is entitled to have distributed to him for that purpose such proportion as his assessment entitled him to.[21] To this extent only can he be held to be the owner of any share or portion of the water, except that, by virtue of the proviso of section 18,[22] he may assign the right to the whole or any portion of the share to which he is entitled. This does not mean, however, that he may make an effectual transfer of his share, free from the trust by which it is encumbered. It still remains subject to that trust, and therefore can be used only for the irrigation of lands within the district, and the irrigation district has no authority to distribute it for any other purpose. The right of assignment conferred by the act on a landowner is limited by the whole policy of the statute to an assignment for irrigation within the limits of the district. We do not understand the contrary to have been held in Board of Directors v. Tregea." [23]

Concerning irrigation districts generally, some other cases are given in note.[24]

(3d ed.)

§ 1358. **Operation of the System in California.**—The writer was informed by a reliable source at the time of the first edition of this book, about six years ago, that out of a large number of irrigation districts organized in California, only three then survived,

[21] Citing sec. 18, Act of 1897, Stats. 1897, p. 259.

[22] Citing Stats. 1897, p. 259.

[23] 88 Cal. 334, 353, 26 Pac. 237.

[24] In addition to the cases already cited, see Palmdale Irr. Dist. v. Rathke, 91 Cal. 538, 27 Pac. 783; Decker v. Perry (Cal.), 35 Pac. 1017; People v. Jefferds, 126 Cal. 296, 58 Pac. 704; Sechrist v. Rialto Irr. Dist., 129 Cal. 640, 62 Pac. 261; Escondido St. S. Dist. v. Escondido Seminary, 130 Cal. 128, 62 Pac. 401; Stimson v. Alessandro Irr. Dist., 135 Cal. 389, 67 Pac. 496, 1034; Nevada Bank v. Poso Irr. Dist., 140 Cal. 344, 73 Pac. 1056; Best v. Wohlford, 144 Cal. 733, 78 Pac, 293; S. C., 153 Cal. 17, 94 Pac. 98.

In the Federal courts: Bradley v. Fallbrook Irr. Dist., 68 Fed. 948; Miller v. Perris Irr. Dist., 85 Fed. 693; Shepard v. Tulare Irr. Dist., 94 Fed. 1; Herring v. Modesto Irr. Dist., 95 Fed. 705; Thompson v. Perris Irr. Dist., 116 Fed. 769; Perris Irr. Dist. v. Thompson, 116 Fed. 836, 54 C. C. A. 336; People v. Brown Valley Irr. Dist., 119 Fed. 538; Board of Supervisors v. Thompson, 122 Fed. 860, 59 C. C. A. 70; Marra v. San Jacinto Irr. Dist., 131 Fed. 780; Wright v. East Riverside Irr. Dist., 138 Fed. 313, 70 C. C. A. 603; Fallbrook Irr. Dist. v. Bradley, 164 U. S. 161, 17 Sup. Ct. Rep. 56, 41 L. Ed. 369; Tregea v. Modesto Irr. Dist., 164 U. S. 179, 17 Sup. Ct. Rep. 52, 41 L. Ed. 395; Tulare Irr. Dist. v. Shepard, 185 U. S. 8, 22 Sup. Ct. Rep. 531, 46 L. Ed. 773.

and that the scheme was regarded as a failure. The explanation given is that it allows too heavy an indebtedness to be placed upon lands by men inexperienced in large affairs. A list of large canals in California [25] gives seventy large canals belonging to companies, and only two operated by irrigation districts (Modesto and Turlock Districts), which co-operate from the same stream—the Tuolumne River—and are practically one district.[1]

It was reported in the newspapers that the people of the Escondido Irrigation District, in Southern California, dissolved the district about two years ago, and upon the final dissolution held a celebration about a bonfire in which they burned the last of the remaining unissued bonds. In the Sacramento Valley the Central Irrigation District had a disastrous history, as given in the note. A private company is now engaged in putting the same project upon a practical basis.[2]

[25] Published in "Water and Forest" for October, 1907, compiled by Prof. Samuel Fortier. There are probably over a thousand canals in the State; the list gives only the very big ones.

[1] The writer has been informed as follows, since the previous edition of this book: "Regarding irrigation districts formed under the State law which are now in existence, they number four, as follows: Modesto Irrigation District, Modesto, Cal.; Turlock Irrigation District, Ceres, Cal.; Alta Irrigation District, Dinuba, Cal.; and Tulare Irrigation District, Tulare, Cal. Those which were originally formed, you will find a complete list in the eleventh census of the United States, 1890, under Agriculture by Irrigation. Those enumerated above, especially the first two, are being successfully administered and are at present in splendid condition, and are the only ones remaining of the fifty districts shown in the eleventh census. The cause of failure of these many districts could be ascertained only by correspondence with those concerned in their organization, as I do not believe there has been anything published on the subject as a whole." From a letter received by the author from the irrigation manager of the United States Department of Agriculture, Office of Experiment Stations, for California.

[2] The following is from a report of the Committee on Commerce in the House of Representatives regarding congressional permission to take water from the Sacramento River (a navigable river) in aid of this reorganization: "Central Irrigation District was organized out of territory taken from Glenn and Colusa counties. The territory covered by Central Irrigation District consists of more than one hundred and fifty thousand acres of as fine land as can be found in the world and is the principal territory affected by this application for water under this bill. As soon as organized bonds were issued and sold by Central Irrigation District, and the money realized from the sale of these bonds was used for construction work, canals, headgates, and rights of way. No part of these bonds has ever been paid, and this indebtedness at this time, which is a preferred lien upon all the lands within the district, amounts to something over one million dollars. More than fifty miles of canal, averaging forty feet on the bottom, was constructed by this district. Expensive headgates and bridges were erected; but before the work was fully completed and the river tapped the district became involved in litigation, the result of which was a collapse of the district and the abandoning of all hope of obtaining water under the district plan,

The Modesto and Turlock Districts in California are, however, after some financial difficulty, now reported in splendid condition. A statute was passed in 1911 to legally class their bonds as approved investments for savings banks and public funds. The Modesto District is extending its irrigated area and offering inducements to settlers on the new lands, "where the land owns the water."[3] Within the last year or two the newspapers have contained reports of several new districts starting in California, and in a note is given an editorial from a daily paper commenting upon that fact, and giving the editor's views in regard thereto.[4]

and all that now remains of what promised to be one of the largest irrigation districts in the world is over fifty miles of excellent canal and a first mortgage lien of over one million dollars, clouding the title of more than one hundred and fifty thousand acres of land, which, at this time, without water, is making the unfortunate owners poor and less able to meet interest due upon mortgages to private individuals and banks, independent of the interest on the bonds impressed upon that land, the holders of which bonds, unless the relief asked for by this bill is granted, must take the lands and homes guaranteeing those bonds." (59th Congress (1906), House Report No. 3216, Senate Report No. 2900, First Session.)

[3] It states that in the six years the district has been in operation over 100,000 acres, more than one-third of the total area, has been planted to irrigated crops; the alfalfa, from five to six cuttings a season, averaging one to two tons per acre for each cutting. Three creameries have been built, each now with daily butter output of about 3,000 pounds. The products include a variety of fruits, nuts, etc. The general price of unimproved land in the district is about $100 an acre, varying with location near or distant from the town of Modesto, of 5,000 inhabitants, and county seat of the county of Stanislaus. The foregoing information is taken from a circular issued by the district. The annual report of the district in 1908 showed receipts of nearly $175,000, mostly from assessments, with disbursements of about $125,000, mostly as interest on bonds, and a balance on hand of about $50,000, and a bonded debt of about $1,400,000; a length of main canal of 44.65 miles, and of lateral canals of 81.33 miles, a total of 125.98 miles.

[4] (From the San Francisco "Chronicle.")

"A Stockton dispatch recently stated that the farmers in the southeastern part of San Joaquin county are endeavoring to organize an irrigation district under the Wright Act. That is a very desirable thing to do, but there must be no more foolishness in these organizations. . . . . The lawyer to give advice should be employed upon the suggestion of banking interests which may be expected to buy the bonds. . . . . Some strong bank should be asked to send an expert to advise as to the ability of the district to bear the burden. These things are essential for several reasons. In the first place, if the reports of these experts are adverse it may save the people of the district from great future trouble. If the reports are favorable they will inspire confidence and resolution in the people. What, perhaps, is of still greater importance is that they will enable the district to borrow any money which may be required, and at low rates. And for the sake of securing the confidence of financial men it is almost essential that the experts be nonresidents of the county or immediate vicinity, even if local men can give the best advice in the world. It was the neglect of all these precautions which brought the old districts to grief and caused their people very heavy losses. More than that, their vicissitudes impaired the confidence of

To insure the validity of organization, statutes were passed in 1911 declaring Turlock, Modesto, Oakdale and San Joaquin Irrigation Districts to be validly organized.[5]

(3d ed.)

§ 1359. **Colorado.**—The statute[6] is set forth in full abstract in Anderson v. Grand Valley Irr. Dist.[7] The court relied upon the California and Federal cases and held the act constitutional, saying: "It seems to us that all of the objections urged upon this hearing under the general head of 'due process of law,' so far, at least, as they affect the appellant, or are involved in, or bear upon the issues raised in this special proceeding, have been met and sufficiently answered in the foregoing decisions, and to repeat the argument of the opinions would be a work of supererogation." The action of the board of directors in excluding land from the district in organizing it may be examined in court for abuse of discretion without proof of fraud or bad faith.[8] The act is held constitutional.[9]

A recent report gives nineteen irrigation districts organized in Colorado.[10] There is some fear lest lack of caution may lead to unfortunate results.[11]

bankers in irrigation district bonds, and a new district will have more to do to establish its credit than if we had never had such districts. Nevertheless, the adjudicated Wright Act is a very valuable asset which the people ought to make use of. It ought to be amended by the next legislature by additional sections providing for the official supervision of these initial stages by the attorney general and the State Engineer."

5 Cal. Stats. 1911, pp. 95–98, quoted in Part VIII, *infra*.

6 Stats. 1901, p. 87; 1903, p. 265; 1905, p. 246, c. 13; 3 M. A. S., 1905 ed., sec. 2309a et seq., amd. 1907, p. 448, c. 194; and 1909, c. 176, and Laws 1911, c. —— (Sen. Bill 281).

7 35 Colo. 525, 85 Pac. 313.

8 Ahern v. Board of Directors, 39 Colo. 409, 89 Pac. 963.

9 *Ibid.*

10 Bulletin 218, Office of Experiment Stations, United States Department of Agriculture.

11 The following is an extract from a letter received by the writer from the State Engineer of Colorado, under date of January 25, 1910: "Our district irrigation law is very unsatisfactory, chiefly because there is no provision for control by disinterested parties, and the field is open to the promotion of districts which have not and cannot have an adequate water supply. At the present time, when there is a perfect rage for irrigation securities, irrigation district bonds are being issued right and left, and the proceeds used for unsuitable work, which will provide insufficient water. It is only a question of time until default will be made on both principal and interest on many of these bonds, and the consequences are likely to be serious."

(3d ed.)

§ 1360. **Idaho.**—The statute is given in the note.[12] The statute is held constitutional.[13] It is based upon the California laws.[14]

Elections, surveys, and similar proceedings are required.[15] A special statute concerns the exercise of the power of eminent domain by irrigation districts.[16] An irrigation district, it is held, may supply outside lands.[17] Petition for organization may be signed by entrymen of land before patent.[18] It may be signed by attorneys in fact representing landowners.[19]

An irrigation district cannot acquire water-rights without condemnation or purchase.[20] An irrigation district may include railroad lands.[21] *Quaere*, whether the act of the board of supervisors is conclusive upon the question of benefit and inclusion of lands.[22] Under certain circumstances, *mandamus* lies to force the district to deliver water,[23] and damages may be given against an irrigation district for failure to supply water.[24]

A confirmation decree is *in rem* and not open to collateral attack,[25] nor open to direct attack after two years;[1] nor does an application for reconfirmation deprive the district of the benefit of a former confirmatory decree.[2] Proceedings for the confirmation

[12] Stats. 1899, p. 408; Stats. 1903, p. 150, amd. 1907, p. 484, c. 140. Amended by Stats. 1911, c. 46, p. 102, (Sen. Bill 99), amending sec. 2434 et seq. of Rev. Codes. See, also, 1911, c. 71 (House Bill 337), approved March 10, 1911. See, also, House Bill 198, Re Black Canyon Irr. Dist. (Stats. 1911, c. 22.) See, also, other amendments in Stats. 1911, c. 154, p. 461; Stats. 1911, c. 181, p. 587.

[13] Nampa etc. Dist. v. Boise, 11 Idaho, 474, 83 Pac. 499; Settlers' Irr. Dist. v. Settlers' Canal Co., 14 Idaho, 504, 94 Pac. 829; Oregon etc. Co. v. Pioneer Irr. Dist. (1909), 16 Idaho, 578, 102 Pac. 904; Pioneer Irr. Dist. v. Bradley (1902), 8 Idaho, 310, 101 Am. St. Rep. 201, 68 Pac. 295; Emmett Irr. Dist. v. Shove (Idaho), 113 Pac. 444; City of Nampa v. Nampa etc. Dist. (Idaho), 115 Pac. 979.

[14] Progressive Irr. Dist. v. Anderson (Idaho), 114 Pac. 16.

[15] Pioneer Irr. Dist. v. Campbell, 10 Idaho, 159, 77 Pac. 328.

[16] Stats. 1907, p. 221. See Knowles v. New Sweden Irr. Dist., 16 Idaho, 217, 101 Pac. 81.

[17] Settlers' Irr. Dist. v. Settlers' Canal Co., 14 Idaho, 504, 94 Pac. 829; Gerber v. Nampa Irr. Dist., 16 Idaho, 1, 100 Pac. 80.

[18] Gem Irr. Dist. v. Johnson, 18 Idaho, 386, 109 Pac. 845.

[19] Black Canyon Irr. Dist. v. Marple (Idaho, 1911), 112 Pac. 766.

[20] Knowles v. New Sweden Irr. Dist. (1909), 16 Idaho, 217, 101 Pac. 81.

[21] Oregon etc. Co. v. Pioneer Irr. Dist. (1909), 16 Idaho, 578, 102 Pac. 904. As to what lands are assessable for purchasing water-rights, see Knowles v. New Sweden Irr. Dist. (1909), 16 Idaho, 217, 101 Pac. 81.

[22] Knowles v. New Sweden Irr. Dist. (1909), 16 Idaho, 217, 101 Pac. 81.

[23] Niday v. Barker (1909), 16 Idaho, 73, 101 Pac. 254.

[24] Snake River Irr. Dist. v. Stevens, 18 Idaho, 541, 110 Pac. 1033.

[25] Knowles v. New Sweden Irr. Dist. (1909), 16 Idaho, 217, 101 Pac. 81.

[1] Progressive Irr. Dist. v. Anderson (Idaho), 114 Pac. 16.

[2] *Ibid.*

of a bond issue by an irrigation district may be instituted before the issuance of the bonds in order to procure a judicial determination of their validity, and to facilitate their sale, and the court may confirm each and all of the proceedings for the organization of such district from and including the petition for its organization, together with all other proceedings which may affect the legality or validity of the bonds, and the order for the sale thereof.[3] The constructive service by posting the application is sufficient to confer jurisdiction; the proceeding is one *in rem*.[4] And a decree of confirmation based upon service by publication alone is enough, and landowners need not be served personally.[5] An irrigation district may be enjoined from flooding private land.[6]

A statute of this year provides a method by which lands lying within and being a part of any irrigation district may be excluded therefrom when the owners of such lands have installed an independent water system for the irrigation of their lands because of the failure of the irrigation district to furnish an adequate water supply therefor, or where they are not agricultural lands.[7]

A late report gives nineteen irrigation districts in Idaho.[8] Information regarding them can be obtained from the State Engineer.

(3d ed.)

§ **1361. Kansas.**—The statute is given in the note.[9]

(3d ed.)

§ **1362. Montana.**—The first act was passed in 1907.[10] Another was passed in 1909.[11] Special provision is made for representation of nonresident owners.

3 Nampa etc. Irr. Dist. v. Brose (1905), 11 Idaho, 474, 83 Pac. 499.

4 Nampa etc. Irr. Dist. v. Brose (1905), 11 Idaho, 474, 83 Pac. 499.

5 Knowles v. New Sweden Irr. Dist. (1909), 16 Idaho, 217, 101 Pac. 81.

6 Teeter v. Nampa etc. Dist. (Idaho), 114 Pac. 8.

7 Stats. 1911, c. 46 (Senate Bill 99), approved March 7, 1911, amending sections 2434, 2435, 2436, and 2437 of the Revised Codes of Idaho.

8 Report of State Engineer of Idaho for 1909–10, p. 271 et seq.

9 Gen. Stats. 1899, secs. 3575–3598; Gen. Stats. 1901, sec. 3683 et seq.; Gen. Stats. 1909, secs. 4479 et seq., 4527 et seq. See Roby v. Shunganunga Dist., 77 Kan. 754, 95 Pac. 399, regarding drainage districts.

10 Stats. 1907, c. 70, p. 136.

11 Stats. 1909, p. 254, c. 146. See Billings Sugar Co. v. Fish, 40 Mont. 256, 106 Pac. 565, 26 L. R. A., N. S., 973, regarding drainage districts.

(3d ed.)

§ 1363. **Nebraska.**—The statute is given in the note,[12] and also some decisions under it.[13]

The exclusion of land may be tested by a suit in equity.[14] The judgment of the county board in organizing the district and as to inclusion or exclusion of land cannot be collaterally attacked.[15]

An irrigation district is a public corporation, and a person dealing with its officers or agents is required to act with reference to the restrictions upon such officers and agents. The board of directors is not authorized to incur indebtedness for labor in the work of construction where no construction fund has been created, nor to proceed to construct the work under its own superintendence with the labor of the residents of the district, without advertising for bids. Where a contract was so entered into and the district has received the benefit of the contract, it would be liable, however, for the reasonable value of the services rendered, not exceeding the contract price, notwithstanding the contract was illegal because of the manner in which it was entered into.[16] The provision that the bonds could be used instead of the proceeds, is a valid enactment, though passed after the bonds were voted.[17]

(3d ed.)

§ 1364. **Nevada.**—The statute is given in the note.[18] In 1911 a new act was passed.[19] It requires annual reports to the State Engineer, and has other new features.

[12] Comp. Stats. 1903, sec. 6476 et seq.; Cobbey's Ann. Stats., sec. 6822; Laws 1895, c. 70, p. 273, amd. 1903, c. 121, p. 616; Stats. 1903, c. 123, p. 625; amd. 1905, p. 649, cc. 165, 166; amd. 1909, pp. 558–572; Comp. Laws (1909), sec. 6476 et seq. Amendments in 1911 are given *infra*, sec. 1438.

[13] Alfalfa Irr. Dist. v. Collins, 46 Neb. 411, 64 N. W. 1086; Wyman v. Searle (Neb.), 128 N. W. 801; Sowerwine v. Central Irr. Dist., 85 Neb. 687, 124 N. W. 118; Andrews v. Lillian Irr. Dist., 66 Neb. 458, 92 N. W. 612, 97 N. W. 336; Baltes v. Farmers' Irr. Dist., 60 Neb. 310, 83 N. W. 83. See, also, Farmers' Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. 286.

[14] Andrews v. Lillian Irr. Dist., 66 Neb. 458, 92 N. W. 612, 97 N. W. 336.

[15] State v. Several Parcels of Land, 80 Neb. 424, 114 N. W. 283; Sowerwine v. Central Irr. Dist. (1909), 85 Neb. 687, 124 N. W. 118.

[16] Lincoln etc. Irr. Dist. v. McNeal, 60 Neb. 613, 83 N. W. 847.

[17] Baltes v. Farmers' Irr. Dist., 60 Neb. 310, 83 N. W. 83.

[18] Comp. Laws 1900, secs. 324–423.

[19] Stats. 1911, c. 134.

(3d ed.)

§ 1365. **New Mexico.**—Statutes were passed introducing the system in 1909.[20]

(3d ed.)

§ 1366. **Oregon.**—The statute is given in the note.[21] The statute is constitutional.[22]

(3d ed.)

§ 1367. **Texas.**—The statute is given in the note.[23]

(3d ed.)

§ 1368. **Utah.**—The statute is given in the note.[24] It was repealed,[25] but re-enacted in 1909.[1] It was amended in 1911.[2] The first decision under the act was Harris v. Tarbet.[3]

(3d ed.)

§ 1369. **Washington.**—The statute is given in the note.[4] The act is held constitutional.[5] The organization and validity of bonds cannot be collaterally attacked.[6] The bonds are negotiable.[7] In populous districts a majority is not needed to institute the organization; but where less than fifty sign the petition, it must appear that the less number is a majority.[8] The validity of the organization of one district has been attacked in the supreme court four times and upheld each time.[9]

20 Stats. 1909, c. 109, p. 295; Stats. 1909, c. 140, p. 383.

21 Bellinger and Cotton's Codes, sec. 4700 et seq. Amended by Stats. 1911, c. 223, p. 378. See, also, Stats. 1911, c. 40, p. 63, dissolving Malheur Irr. Dist.; Stats. 1911, c. 241, p. 424, for drainage districts; Stats. 1911, c. 172, p. 256, for organization of co-operative irrigation or drainage corporations.

22 Little Walla Walla Irr. Dist. v. Preston, 46 Or. 5, 78 Pac. 982, *semble*. As to issuance of additional bonds, see Hall v. Hood Riv. Irr. Dist. (Or.), 110 Pac. 405.

23 Sayles' Civ. Stats. Supp. 1906, p. 269.

24 Laws 1888, p. 127; Rev. Stats. 1898, sec. 1287 et seq.

25 See Stats. 1905, c. 108, sec. 71.

1 Laws 1909, c. 74, p. 144.

2 Stats. 1911, c. 53, p. 70.

3 19 Utah, 328, 57 Pac. 33.

In a bulletin of the United States Department of Agriculture it is said that the repeal of the act was because it had accomplished no results. Bulletin 124 U. S. Dept. Agric., p. 31.

4 Ballinger's Code, sec. 4166 et seq.; Pierce's Codes (1905), secs. 5736, 5881 et seq. Amended by Stats. 1911, c. 97.

5 Board of Directors etc. v. Preston, 4 Wash. 147, 29 Pac. 995; Kinkade v. Witherop, 29 Wash. 10, 69 Pac. 399.

6 Purdin v. Washington etc. Assn., 41 Wash. 394, 83 Pac. 773.

7 Kinkade v. Witherop, 29 Wash. 10, 69 Pac. 399.

8 Rothschild Bros. v. Rollinger, 32 Wash. 307, 73 Pac. 367.

9 Board of Directors v. Peterson, 4 Wash. 147, 29 Pac. 995; State ex rel. Witherop v. Brown, 19 Wash. 383, 53 Pac. 548; and Kinkade v. Witherop, 29 Wash. 10, 69 Pac. 399; Rothchild Bros. v. Rollinger, 32 Wash. 307, 73 Pac. 367.

(3d ed.)

§ 1370. **Wyoming.**—The system is introduced into Wyoming by the act of 1907.[10] It provides for representation of nonresidents. The State Engineer is to pass upon all projects. In his last report he notes that the act is imperfect in numerous particulars.[11]

(3d ed.)

§ 1371. **Conclusion.**—The irrigation district system is a direct application of the principle of public ownership of public utilities; and to be successful requires care and ability upon the part of the leaders and public officials. The disasters in California seem to have been chiefly the result of things which public ownership in all lines must guard against—namely, working upon the enthusiasm of the voter without coming down to the "bedrock" of cautious figuring regarding finances and water supply. Protracted and costly litigation by minority landowners added its share to the mismanagement and engineering mistakes. Nor do the new districts now forming in California and elsewhere figure very closely, for it appears, for example, that "in all of the States the limitation on the price at which bonds may be sold is a dead letter, because of the fact that they may be issued in payment for works. It is customary to arrange with some contractor for the building of the proposed works or for the purchase of works already built on the basis of payment in bonds, and the price is fixed accordingly. A recent newspaper report states that the bonds of a certain district in a State where bonds may not be sold below ninety-five were taken by the contractor at thirty-seven cents. In other words, the people of that district are paying nearly three prices for their work."[12] There seems room for the warning above given by the State Engineer of Colorado and other observers.

[10] Stats. 1907, c. 72, p. 103; Comp. Laws (1910), sec. 829 et seq.; amended by Laws 1911, c. 31, p. 44 (regarding bonds); Laws 1911, c. 99, p. 139. See, also, Laws 1911, c. 95, p. 139, regarding drainage districts.

[11] Report of State Engineer, 1909–10, p. 119.

[12] Page 412, Report for 1909 of the Office of Experiment Stations, United States Department of Agriculture.

§§ *1372–1379. (Blank numbers.)*

CHAPTER 59.

STATE IRRIGATION UNDER THE CAREY ACT.

§ 1380. Sources of information.
§ 1381. The act of Congress.
§ 1382. State statutes.
§ 1383. Initiation of projects.
§ 1384. Results so far obtained.
§ 1385. Prices under Carey Act projects.
§§ 1386–1393. (Blank numbers.)

(3d ed.)

§ 1380. **Sources of Information.**—Very few adjudicated cases under the Carey Act are contained in the reports.[1] The following is taken chiefly from reports of the State Engineers and bulletins of the United States Department of Agriculture. A number of rulings of the Department of the Interior will be found in the Land Decisions.[2] Most of the States publish rules and regulations which may be obtained by addressing the State Engineer or the State land board.

(3d ed.)

§ 1381. **The Act of Congress.**—The Carey Act was passed and approved August 18, 1894, and has been since amended.[3] It provides that the United States will grant, without charge, to each State containing desert lands, 1,000,000 acres, or as much thereof as the State shall cause to be reclaimed. By the original act, reclamation must be complete within ten years from the date of the act, but by the amendment of 1901 the time is made ten years after the initiation of each project. The State is authorized to enter into contracts with individuals or corporations to construct irrigation works, and a contract is made by the State with the United States whereby title to the lands will eventually pass to

[1] A suit by a State to annul the rights of an individual under the Carey Act is a suit arising under the laws of the United States such as to be removable to the Federal courts. State v. Three Sisters Irr. Co. (Or.), 158 Fed. 346. Carey Act expounded and contract under it considered in McKinney v. Big Horn Co. (Wyo.), 167 Fed. 770. See, also, Cookinham v. Lewis (Or.), 114 Pac. 88.

[2] E. g., 38 Land Dec. 508 et seq.

[3] See *infra*, sec. 1428, Federal statutes.

the State and from the State to the settler. The State binds itself to see that the lands are disposed of in tracts not exceeding one hundred and sixty acres, and only to actual settlers. By the amendment of 1896, a lien for expense of reclamation may be created upon the lands by the State.

By an act of February 21, 1911 (Pub. No. 406) the United States Reclamation Service may furnish, from its own projects, surplus water to Carey Act projects.

(3d ed.)

§ **1382. State Statutes.**—Numerous States have passed statutes accepting the grant contained in the act of Congress and providing terms for its execution, viz.: Colorado,[4] Idaho,[5] Montana, Nevada,[6] New Mexico,[7] Oregon, Utah,[8] Wyoming,[9] and possibly other States.[10] Wyoming was the first to accept it, but Idaho leads in the extent of work. The State Engineers of other States urge its adoption.

Some of the essential features common to these State statutes are as follows: The construction company appropriates water under the ordinary State laws and builds distributing works under State supervision. A perpetual water-right is contracted for by each settler. He pays the company for his water-rights, and also pays, for maintenance, a charge fixed by contract between the company and the State, varying in amount according to circumstances.[11]

[4] Laws 1907, p. 367; Laws 1911, c. —— (Sen. Bill 56); Laws 1911, c. —— (Sen. Bill 544).

[5] See Stats. 1911 (Sen. Bill 20, and House Bills 111 and 245); Stats. 1911, cc. 3, 35, 51, 201, 219.

[6] Act of March 23, 1909, and Stats. 1911, c. 76; Stats. 1911, c. 205, p. 439; Stats. 1911, p. 452.

[7] Laws 1909, p. 260.

[8] See Stats. 1911, c. 102, p. 141.

[9] Rev. Stats. 1899, sec. 934 et seq.; Laws 1909, pp. 105, 222; Laws 1911, c. 94, p. 138.

[10] See A. C. Feb. 18, 1909 (35 Stat. 638, c. 150), extending the Carey Act to Arizona and New Mexico.

[11] The standard form of contract by the company with the State in Wyoming provides in this regard (Report of State Engineer for 1908-9):

"The term 'water-rights' employed herein relates to an interest, as hereinbefore limited, in the irrigation works and in the permits held by the company relating thereto, in the proportion that the area of irrigable land held by the settler bears to the entire area of irrigable land under the whole system, it being understood that the final water-right goes direct from the State to the settler, or to such organization of settlers as may be provided for the government of the system of irrigation. The company will sell to any and all settlers upon said lands permanent and perpetual water-rights as aforesaid in graded prices therefor, at the option of the settler, subject to the limitations herein established, as follows: *Grade No. 1.* When such water-right is fully paid for by the

When a certain percentage of the land and water-rights have been disposed of to settlers (usually ninety per cent), the statutes provide that the development company turns over the works to a co-operative organization of the consumers, so that thereafter they shall belong solely to and be operated by the consuming public. The title to the lands also passes to the settlers, each settler paying fifty cents per acre to the State when he gets his patent, and thereupon his water-right becomes appurtenant to his land.[12]

(3d ed.)

§ 1383. **Initiation of Projects.**—The following statements outline the procedure required in initiating the Carey Act projects:

"The legislature of the State of Idaho in 1895 provided for the acceptance of the act of Congress and passed a law providing that persons desiring to build irrigation works under the provisions of this law should present their proposals to the State board of land commissioners, describing the character of works to be built, the nature of the water-rights, the water supply, and specifying the price and terms at which water-rights were to be sold. Under the law this application is referred for examination to the State Engineer, whose duty it is to report upon the water supply, water-rights, the character of the land, and the feasibility of the project generally. After the making of the report by the State Engi-

settler at the date of contract therefor, the sum of twenty dollars ($20.00) per acre. This rate or grade to expire and become null and void from and after the 30th day of June, A. D. 1909. *Grade No. 2.* When such water-right is contracted for on terms of a partial payment down and the balance in five annual installments, the sum of twenty-five dollars ($25.00) per acre, with interest thereon at the rate of six per cent per annum. This rate or grade to expire and become null and void from and after the 31st day of December, A. D. 1909. *Grade No. 3.* When such water-right is contracted for on terms of a part payment down and the balance in ten annual payments, the sum of thirty dollars ($30.00) per acre, with interest thereon at six per cent per annum. This rate shall be in full force and effect permanently, and from and after the 30th day of June, A. D. 1910, it shall be the only rate that will not have expired. *Grade No. 4.* When such water-right is contracted for on terms of five equal annual installments without interest, the sum of thirty ($30.00) dollars per acre. This rate or grade to expire and become null and void from and after the 30th day of June, A. D. 1909. *Grade No. 5.* When such water-right is contracted for on terms of ten equal annual installments without interest, the sum of thirty-eight ($38.00) dollars per acre. This rate or grade to expire and become null and void from and after the 30th day of June, A. D. 1910."

[12] E. g., "The water-rights to all lands acquired under the provisions of this chapter shall attach to and become appurtenant to the land as soon as title passes from the United States to the State." Wyo. Rev. Stats. 1899, sec. 955.

neer, the State board of land commissioners either rejects or accepts the application, and in case of acceptance, it appoints a State agent to select and segregate the land. The various papers required by the regulations are forwarded to the Department of the Interior, and when these are approved a contract is entered into between the State and the United States providing for the conveyance of the land to the State when an ample supply of water is actually furnished in a substantial ditch or canal to reclaim the land. When the works are constructed a patent is issued to the State, without regard to settlement of the land. When work is actually commenced and the State land board is satisfied as to the soundness of the project, the land under the State law is thrown open for entry. No settlement, however, is required at this time. When the water is ready for delivery it is the duty of the canal company to give notice to that effect, and, under the law, within six months thereafter the entryman must take up his residence on the land and continue to reside there until he has made his final proof. This he may do in any time from five weeks to three years, depending upon the time spent by him in reclaiming his land. In order to prove up, he must cultivate and reclaim one-eighth of each legal subdivision before final proof can be made."[13]

The State Engineer of Idaho further gives the following statement:[14] "1st. File with the State board of land commissioners a statement showing the land to be reclaimed, with a request for its selection by the State. 2d. File with the above request a map, in duplicate (drawn upon tracing linen, on a scale of 1,000 feet to the inch), showing the lands and the system of irrigation. (The map should bear an affidavit of the engineer, who made or supervised the preparation of the map and plan; and also of the officer authorized by the State to make its selection under the act.) 3d. File two copies of the field-notes from which the map is drawn. 4th. File three copies of complete list of lands to be 'selected, designated by legal subdivisions properly summed up at the foot of each page and at the end of the list.' (These lists should be clear carbon copies, and should be dated and verified by a certificate of the selecting agent.) 5th. File a proposal to construct the irrigation works necessary to properly irrigate the described land.

[13] Report of State Engineer of Idaho, 1908; and Bulletin 216, O. E. S., United States Department of Agriculture.

[14] Compilation of Idaho Laws issued by the State Engineer of Idaho in 1905.

This proposal shall state: 1. The source of water supply; 2. The quantity of water appropriated; 3. A certified copy of water location notice or permit to appropriate water from the State Engineer; 4. The price per acre at which water-rights will be sold to settlers and the terms of payments; 5. The annual charge per acre for maintenance of works until ownership passes to settlers; 6. The time required for the completion of works and delivery of water to the settler; 7. Furnish statement to enable the board to judge the financial ability of the applicant to carry out the proposed plans; 8. A certified check for $250, payable to the State treasurer, must be deposited with the secretary of the board, to be forfeited to the State in case of failure to enter into contract with the State board in accordance with the proposal, if the proposal is accepted; otherwise, to be returned to the proposer. Maps and plans must be prepared in accordance with the regulations of the Department of the Interior and the State Engineer's office, and copies of maps and documents furnished the State Engineer's office."

The Oregon laws have been said by the State Engineer to be similar to the Idaho laws.

In Wyoming:[15] "The company proposing to carry on such development first makes its surveys and plans for this work; then secures the necessary permits from the State Engineer's office; then makes its request and proposal to the State board of land commissioners, composed of the governor, the Secretary of State, and the superintendent of public instruction. This request and proposal describe the lands that are to be irrigated and contain the proposition of the company to the State as to price of water-rights and a permanent interest in irrigation works, the form of contract to be used, and other particulars. If the State board of land commissioners approves of the proposition, maps and a request for the segregation of the lands are transmitted to the proper local land office. The lands designated are immediately withdrawn from entry and the local land office submits the request to the General Land Office at Washington, where the approval of the Secretary of the Interior finally places the State in control of the land. The works are then completed by the company. The land cannot be taken up until the settler shows the State that he has entered into contract with the company for a sufficient water-right

[15] Bulletin 205, O. E. S., United States Department of Agriculture.

for his lands and a perpetual interest in the irrigation works, proportioned in the ratio of the area of his land to the entire tract to be reclaimed. When the irrigation works are completed the State Engineer makes an inspection, and, if they are found to comply with the plans and specifications which have been already passed upon by him, the State board of land commissioners is so notified; whereupon the board makes a request to the government that patent issue. The patent comes to the State and the lands are sold and patent given the settler upon the payment of fifty cents per acre, the payments for water-rights being made to the company building the works." There is a provision by statute in Wyoming [16] as follows: "No contract shall be made by the board which requires a greater time than five years for the construction of the canal, works or irrigation system, and all contracts shall be conditioned that active construction work shall begin within six months from the date of the contract, and that at least one-tenth of the construction work shall be completed within one year of the date of the contract; that at least one-third of the construction work shall be completed within two years from the date of the contract and that construction shall be prosecuted diligently and continuously to completion; and that a cessation of work under the contract of the State for a period of ninety days during the months of May, June, July, August, September, October and November, after the second year will forfeit to the State all rights under the said contract."

(3d ed.)

§ 1384. Results so Far Obtained.—The leading results in reclamation under the Carey Act at this writing have been obtained in Idaho. The acreage projected under the various Twin Falls projects in that State was, in 1908, 1,211,000 acres; and there were about fifteen other projects begun or planned. At present there are about forty-six projects under way. Over a hundred thousand acres have been sold to and cultivated by settlers in Idaho Carey Act projects. Charges for water-rights, payable in ten annual installments, vary from $15 per acre to $65 per acre, the average being apparently about $30 to $35 per acre. Regarding the main Twin Falls project, the State Engineer of Idaho says: [17]

[16] Rev. State. 1899, sec. 947, as amended by Laws 1909, c. 160.

[17] Report 1907–8; also Bulletin 216, O. E. S., United States Department of Agriculture.

"The largest and most important contract made in any State under the provisions of the Carey Act was the contract of January, 1903, made by the State of Idaho with the Twin Falls Land and Water Company for the irrigation and reclamation of 270,000 acres of land situated in what was then Cassia and Lincoln counties. This project covered a magnificent body of land, the early reclamation of which had been prevented by reason of difficult engineering features, enormous cost, and inadequate security to the investor as well as distance from transportation. The contract with this company provided for the construction of a dam in Snake River, approximately 2,000 feet long and 80 feet in height, which should raise the level of the river 50 feet. Water was to be diverted on the south side of the river in what was then Cassia County, by means of a canal 80 feet wide on the bottom, 124 feet wide on the top, constructed to carry a depth of 10 feet of water, and having a length of approximately 80 miles. On the north side of the river water was to be diverted in a smaller canal for the irrigation of 30,000 acres of land lying in Lincoln County. Construction work was commenced on the dam in the spring of 1903. On March 1, 1905, the construction of the dam was completed, the gates were raised, and water was turned into the first section of the canal covering 50,000 acres. Construction work was prosecuted vigorously, and the canal system on the south side of the river was finally completed in the fall of 1907. The main canal is now 83 miles long, and the approximate total length of all of the canals on the tract, including natural channels and farmers' distributaries, is 1,000 miles. The area covered is 215,000 acres. Water was first delivered for use under this canal system in the spring of 1905. One hundred and eighty-seven thousand acres under the canal has been settled upon, and at the present rate of settlement the remainder will probably be taken within the next twelve months. During the past year (1908) approximately 90,000 acres was in cultivation under this system and the remainder was being improved as rapidly as the resources of the settlers would permit. Under the law the required amount in cultivation on this tract, in order to make final proof, would be less than 25,000 acres, so that the cultivation actually done is nearly four times as great as required by law. In the beginning the average size of farms on this tract was 120 acres. It is now less than 80 acres, showing the tendency of irrigated tracts toward

small farms and intensive cultivation. Notwithstanding the large number of water users, nearly 2,400 in all, whose water contracts aggregate $4,500,000, no judgment of foreclosure has been rendered in any case and the advanced payments made have exceeded the defaults. Water-rights under this system were sold at $25 per acre, a cash payment of $3 per acre being required, the balance being paid in nine annual installments with interest at 6 per cent." As a result, in addition to the irrigation works, the company has established towns, telephone systems, waterworks, and electric light plants. The lands under the project were established as a separate county in 1907, named Twin Falls County. The county seat, the town of Twin Falls, was estimated to have 4,000 population in 1908, with schoolhouses, churches, and other public buildings, and a sewerage system.

In Wyoming the State Engineer in 1908 reported 2,000.000 acres allotted to the State by the United States, over 1,000,000 of which were being developed by thirty-five companies, and thirteen new projects accepted by the authorities.[18]

In Oregon about 432,000 acres had been selected in 1908, and contracts covering works for 183,834 acres already approved; about 40,000 acres actually at that time reclaimed. Prices for water-rights varied from $10 to $40 per acre, the average probably about $30. The chief project is that upon the Deschutes River, covering 140,000 acres in a tract 15 miles by 25 miles. The land is sold in 40 acre tracts, the price being fixed by State contract at $40 per acre for irrigable land and $2.50 per acre for waste land. Maintenance charge is fixed at 80 cents per acre. Control shall pass to the settlers in 1917. One project provides for settlers' control when eighty per cent of the lands have been sold.[19]

In Nevada in 1908 there was one project for which 23,643 acres had been selected, but the works were not yet built. In Colorado, in 1910, there were projects covering 56,302 acres.[20]

The total acreage now under irrigation under Carey Act projects is probably about 150,000 acres. The figures can be obtained from the General Land Office, upon inquiry as to the amount patented to the State. The success of the most prominent projects resulted in a boom in which there have been some losses.

[18] Report of State Engineer of Wyoming for 1908.

[19] See Reports of State Engineer.

[20] Bulletin 218, p. 27 (O. E. S.).

(3d ed.)

§ 1385. **Prices Under Carey Act Projects.**—Up to 1908, the highest price chargeable to settlers under Idaho Carey Act projects was $50 per acre.[21] Some more expensive projects have since been undertaken. The following are lists of charges under Carey Act projects in Idaho and Wyoming, compiled from official sources.

Carey Act Projects in Idaho.

Project.	*Approximate Acreage.*		*Price per Acre.*
American Falls Canal & Power Company	57,000		$15.00 to $25.00
Canyon Canal Company	6,000	Carey Act	
	13,000	State & private land.	20.00 to 30.00
Marysville Canal & Improvement Company	6,500		6.00, 10.00 & 20.00
Twin Falls Land & Water Company	214,000		25.00
Big Lost River Land & Irrigation Co.	79,000		40.00
Idaho Irrigation Company	160,000		25.00 to 50.00
Twin Falls North Side Land & Water Co	189,000		35.00
Twin Falls Land & Water Co. (Pumping)	40,000		40.00
West End Twin Falls Irrigation Company	47,000		40.00
Owyhee Irrigation Company	3,300		45.00
Pratt Irrigation Company	4,500		28.00
Mud Lake Project	12,000		25.50
Twin Falls Salmon River Land & Water Co	128,000		40.00
Portneuf-Marsh Valley Irrigation Co.	12,000		35.00
King Hill Irrigation & Power Company	18,000		65.00
Houston Ditch Company	1,900		25.00 to 35.00
Twin Falls Land & Water Co. (Extension)	600,000		50.00
Twin Falls North Side Land & Water Co. (Clover Creek)	45,000		45.00
Twin Falls Oakley Land & Water Co.	44,000		65.00
Owyhee Land & Irrigation Company	30,000		65.00
Victor Hegsted Project	3,500		25.00
Thousand Springs Land & Irrigation Co., Ltd.	6,500		30.00
Twin Falls North Side Land & Water Co. (Mullens Project)	6,500		45.00
Idagon Irrigation Company	10,000		60.00
Dubois Project	316,000		40.00
Crane Falls Power & Irrigation Company	5,000		65.00
King Hill Extension Irrigation Company	9,800		65.00
Snake River Irrigation Company	6,800	Carey Act	
	probably 5,000	private land	50.00
Tabor Irrigation Company	22.000		45.00
Lemhi Irrigation Company	10,600		40.00

[21] Report of State Engineer for 1909–10, p. 180.

Project.	*Approximate Acreage.*		*Price per Acre.*
Little Lost River Land & Irrigation Co.	45,500		$40.00
Yellowstone Land & Irrigation Company	8,000		20.00
Thomas Keating Project	18,000		30.00
C. V. Hansen Project	3,800		40.00
Twin Falls Raft River Irrigation Company originally	50,000	reduced	50.00
	30,000	to	
Pahsimeroi Irrigation Company	43,000		25.00
Bruneau Irrigation Company	49,700		60.00
Southern Idaho Reclamation Company	67,000		70.00
Twin Falls Shoshone Land & Water Co.	5,200		60.00
Grandview Land & Irrigation Company	1,000		65.00
Blaine County Irrigation Company	15,500		40.00
Twin Falls North Side Land & Water Co. (North Milner Pumping Plant)	10,000		60.00
South Milner Pumping Project	3,700		60.00
T. R. Jones Project	28,000		55.00
Stanley Valley Irrigation Project	50,000		35.00
Boise City Carey Act Project	145,600	Carey Act	100.00
	162,000	(State and private lands.)	

Carey Act Projects in Wyoming.

Project.	*Approximate acreage.*	*Price per acre.*
North Platt Canal and Colonization Co., Wyncote, Wyoming	14,424.44	$30.50
Wyoming Development Company, Wheatland, Wyoming	7,000	37.50
La Prele Ditch Company, Douglas, Wyoming	20,000	30.50
Sahara Ditch Company, Buffalo, Wyoming	7,920.3	30.50
Hanover Canal Company, Worland, Wyoming	10,682.53	30.50
Oregon Basin Project, Wiley, Wyoming	204,620.52	30.00 to 40.50

§§ *1386–1393. (Blank numbers.)*

CHAPTER 60.

NATIONAL IRRIGATION.

§ 1394. The Reclamation Act.
§ 1395. Acquisition and protection of Federal water-rights.
§ 1396. Power of the Secretary of the Interior.
§ 1397. Acts of Congress, 61st Session (1909–10).
§ 1398. Acts of Congress, 62d Session (1910–11).
§ 1399. Progress of the work.
§§ 1400–1408. (Blank numbers.)

(3d ed.)

§ 1394. The Reclamation Act.—The Reclamation Act is reprinted in the collection of Federal statutes below.[1]

While some doubts were cast upon the constitutionality of the National Reclamation Act in Kansas v. Colorado,[2] the matter was not directly there involved. In the lower Federal courts, when specifically attacked, it has been upheld.[3] In one case it was upheld on the ground that the United States may go into the reclamation of its own lands to make them salable where otherwise they could not be sold, provided it proceeds under State law like other appropriators;[4] and a project under the act, where the primary purpose is irrigation of *public* land, is not invalid if incidentally involving private land, especially where the co-operation of the private owners is essential to the irrigation of the public land also.[5] In another case the act was held not invalid because the work is proprietary instead of governmental in character, or as affecting lands within States, or as authorizing expenditures without appropriations by Congress, or as delegating legislative authority to the Secretary of the Interior.[6]

It is held that the United States, in respect to water-rights, must proceed under State law, like private parties.[7]

[1] *Infra*, sec. 1429.
[2] 206 U. S. 46, 27 Sup. Ct. Rep. 655, 51 L. Ed. 956.
[3] United States v. Burley (Idaho, 1909), 172 Fed. 615, affd. in 179 Fed. 1; United States v. Hanson (Wash.), 167 Fed. 881.
[4] United States v. Burley (Idaho, 1909), 172 Fed. 615, affd. in 179 Fed. 1, quoted *supra*, sec. 133.
[5] *Ibid.*
[6] United States v. Hanson (Wash.), 167 Fed. 881.
[7] Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. Rep. 655, 51 L. Ed. 956; United States v. Burley (Idaho, 1909), 172 Fed. 615, affd. in 179 Fed. 1. But see Winters v. United States, 207 U. S. 564, 28 Sup. Ct. Rep. 208, 52 L. Ed. 340, and McMillan Reservoir Site, 37 Land Dec. 6.

It has been held that under the Reclamation Act, withdrawal of unsurveyed lands may be made, though a settler had occupied the land for eleven years before the Reclamation Act passed. Naked possession is held to give no rights against the United States. An occupant is a mere trespasser. The lower court, Mr. Justice Whitson, had held the settler's possession to be a lawful claim, under encouragement of Congress, as was held in the early days.[8] But the upper court held that the government may dispossess him without compensation.[9]

(3d ed.)

§ 1395. Acquisition and Protection of Federal Water-rights.—"The congressional act, from which alone the Secretary of the Interior derives his authority, expressly provides that in appropriating, distributing, and using water he shall proceed in conformity with the laws of this State and it is not pretended here that the officers of the government claim, or have claimed, exemption from the limitations of such laws. Without going into details, it may be stated generally that the plaintiff, in prosecuting its work, has followed substantially the same course which, under the laws of Idaho, a private corporation, in appropriating and diverting public waters for the purposes of irrigation, must pursue";[10] that is, the United States obtains a permit from the State Engineer (in States having water codes). Sometimes State statutes have been passed with special reference to appropriations by the United States.[11]

Section 7 of the Reclamation Act provides that the Secretary of the Interior may acquire property for the Reclamation Service

8 *Supra*, sec. 89.

9 United States v. Hanson (Wash.), 167 Fed. 881.

10 United States v. Burley, 172 Fed. 615, affd. in 179 Fed. 1 (1910).

11 *Montana.*—Stats. 1905, c. 44, p. 80, sec. 1; Rev. Stats. 1907, sec. 4846.

Nebraska.—Cobbey's Ann. Stats. 6891; Laws 1905, p. ——, sec. 1; Laws 1911, *infra*, sec. 1438.

Nevada.—See Stats. 1901, p. 72; Stats. 1903, p. 18; Stats. 1905, pp. 66, 93, 197; Stats. 1907, p. 30; Stats. 1911, c. 205, p. 440, repealing an act of March 16, 1905.

New Mexico.—Stats. 1907, c. 49, sec. 40.

North Dakota.—Laws 1905, c. 34, sec. 36, p. 54.

Oklahoma.—Laws 1905, c. 21, sec. 26, p. 287.

Oregon.—Laws 1905, c. 228, sec. 2, p. 401.

South Dakota.—Laws 1905, c. 132, sec. 36, p. 209; Laws 1907, c. 180, sec. 37, p. 384.

Utah.—Comp. Laws 1907, sec. 1288-x13; amd. Stats. 1909, c. 62, p. 84.

Washington.—Stats. 1905, c. 88, sec. 3, pp. 180, 181; Pierce's 1905 Codes, sec. 5903.

See, also, Statutes cited *infra*, sec. 1418.

by purchase or condemnation suit. A complete list of such acquisitions to June 30, 1909, is given in the eighth annual report of the Reclamation Service.

The United States on several projects has brought suit in local courts to settle existing rights on streams before beginning work.[12] In one case the United States brought suit to enjoin pumping from a well to impairment of supply of a proposed project.[13]

(3d ed.)

§ 1396. **Power of the Secretary of the Interior.**—It is ruled that the Secretary of the Interior's power is limited to that expressly granted by the Reclamation Act.[14] The act leaves to his judgment the estimation and apportionment of charges against the land, and he may divide the charges into two parts—one for construction and one for maintenance, though this does not mean charges which are unreasonable or such as might be arbitrarily fixed.[15] No power exists in the secretary to formally grant specific extension of time for payment of overdue water charges.[16]

(3d ed.)

§ 1397. **Acts of Congress, 61st Session (1909–10).**—Acts were passed at this session providing issuance of $30,000,000 bonds in aid of reclamation projects;[17] allowing entrymen to assign before patent;[18] concerning townsites in reclamation projects;[19] concerning dry-farming enlarged homesteads in Idaho;[20] granting leave of absence to entrymen.[21] These and other statutes are below printed.[22]

(3d ed.)

§ 1398. **Acts of Congress, 62d Session (1910–11).**—Acts authorize the sale of surplus waters;[23] allow the entry of claims which have once been entered by claimants who have abandoned

12 E. g., United States v. Judkins; Hurley v. Abbott. See 7th Am. Rep. Recl. Serv. 11, 12; 8th Rep. 5, 6.

13 *Ibid.*, 8th Rep. 6.

14 United States v. Burley (Idaho), 172 Fed. 615 (*dictum*). See Burley v. United States, 179 Fed. 1; United States v. Cantrall (Or.), 176 Fed. 949 (*dictum*).

15 United States v. Cantrall (Or.), 176 Fed. 949.

16 Assistant Attorney General, April 19, 1909; approved by Secretary, April 22, 1909. Congress has since made extensions.

17 Printed below, Part VIII.

18 Sess. Laws, 61st Cong. (1910), 2d Sess., c. 357.

19 *Ibid.*, c. 284.

20 *Ibid.*, c. 298.

21 *Ibid.*, c. 432.

22 *Infra*, Part VIII.

23 S. 6953. Public 406.

them;[24] permit a distribution of the payments due from settlers which will be more favorable to them without postponing the final payment in full;[25] and authorize the sale of small parcels of land not needed by the service, etc.[1]

(3d ed.)

§ 1399. **Progress of the Work.**—The Reclamation Act was passed in 1902. Some of the thirty or more projects under way are: the Roosevelt dam in Arizona, seventy miles above Phoenix; Gunnison tunnel, in Central Colorado; dike at Pathfinder dam, in Central Wyoming; Teton system in Yakima Valley, Washington; Boise system in Idaho; Minidoka system in Idaho; Belle Fourche in South Dakota; dam on Yellowstone in Montana; dam on Rio Grande, New Mexico. It is stated by the Department of Agriculture[2] that when projects already in course of execution under the Reclamation Act and Carey Act are completed, the total will be 18,000,000 acres. At the end of the year 1910 there were projects for 3,150,000 acres, water ready for 876,000, actual irrigation being paid for on 534,000. In December, 1909, there were about 14,000 farms under the projects, which, allowing five people to the farm, would be about 70,000 people then dependent upon the service.[3]

The total cost will be $80,000,000, of which $50,000,000 had been expended by 1910. The increase of population which has rapidly followed the work necessitated a more rapid completion of projects already begun than was intended, with the result that no new work will be undertaken by the Reclamation Service until the present projects are finished. This also necessitates a more rapid realization of funds. Normal receipts are about $7,000,000 a year. President Taft recommended the further issuance of bonds, and a statute for the issuance of $30,000,000 in bonds passed in 1910.

It is generally said that while lands cost the settler about $25 to $50 per acre, he must be prepared with capital of about $1,500 to $2,000 additional in order to sustain himself up to the time his crops become producing. In 1908 it was decided to grant additional time to the settlers in which to pay their installments to the government. The impounding works at the Platte

[24] Public 386.

[25] S. 6842. Public 353.

[1] Public 338.

[2] Report No. 87 for 1908. See, also, *Ibid.*, p. 364.

[3] This is a rough estimate. The Census will show the exact figures.

River, in Wyoming, the Roosevelt dam, in Arizona, and the Shoshone project, in Wyoming, have been completed, and settlers have gone to the lands, awaiting the completion of lateral distributing systems, to be built with funds from the bond issue above mentioned.

The following charges are made by the Reclamation Service:

U. S. Reclamation Service Projects.

State.	*Project.*	*Building Charge, per Acre.*	*Maintenance and Operation, per Acre.*
Arizona—California	Yuma	$55.00	$1.00
California—Oregon	Klamath	30.00	0.75
Idaho	Minidoka	22.00; 30.00; 40.00	0.60
Kansas	Garden City	37.50	2.75
Montana	Huntley	30.00	0.60.
"	Lower Yellowstone	42.50	1.00
"	Sun River	30.00	0.50
Nebraska	North Platte	35.00° to 45.00§	2.00°; 1.25§
Nevada	Truckee—Carson	22.00 to 30.00	0.60
New Mexico	Carlsbad	31.00	1.35
North Dakota	Buford—Trenton	38.00	0.70 per acre. 0.50 " acre-ft.
North Dakota	Williston	38.00	0.70 per acre. 0.50 " acre-ft.
Oregon	Umatilla	60.00	1.30
South Dakota	Belle Fourche	30.00	0.60
Washington	Okanogan	65.00	1.50
Washington	Sunnyside	52.00	0.95
Washington	Tieton	93.00	1.50
Wyoming	Shoshone	45.00 and 46.00	1.00

§§ *1400–1408. (Blank numbers.)*

CHAPTER 61.

REGULATIONS OF THE DEPARTMENT OF THE INTERIOR UNDER THE RECLAMATION ACT.

(The following chapter is a reprint of the Regulations of the Department of the Interior "Relating to the Reclamation of Arid Lands by the United States," prepared by Fred Dennett, Commissioner, and approved May 31, 1910, by R. A. Ballinger, Secretary.)[1]

General information.
Withdrawals and restorations.
Additional entries.
Cancellation.
Widows and heirs of entryman.
Control of sublaterals.
Water-rights for lands in private ownership.
Vested water-rights.
Corporation lands.
Reclamation of lands in private ownership.
Cancellation of water-right.
Water-right application.
Water-right charges.
Regulations as to the collection of reclamation water-right charges by receivers of public moneys.
Desert land entries within a reclamation project.

General Information.—1. Section 3 of the act of June 17, 1902 (32 Stat. 388), provides for the withdrawal of lands from all disposition other than that provided for by said act. Lands withdrawn as susceptible of irrigation (usually referred to as a withdrawal of the second form) are subject to entry under the provisions of the homestead law only, and entries thereof are made in practically the same manner as the usual homestead entry, but they are subject to all the provisions, limitations, charges, terms, and conditions of the Reclamation Act.

2. Registers and receivers will indorse across the face of each homestead application, when allowed under the Reclamation Act, the following: "This entry allowed subject to the provisions of the act of June 17, 1902 (32 Stat. 388)"; and will advise each entryman of the provisions of the act by furnishing him with a copy of this circular.

[1] 38 Land Dec. 620–646.

3. These entries are not subject to the commutation provisions of the homestead law, and on the determination by the Secretary of the Interior that the proposed irrigation project is practicable, the entries may be reduced in area to the limit representing the acreage which, in the opinion of the secretary, may be reasonably required for the support of a family upon the lands in question, and the lands within a project are platted to farm units representing such areas. The farm units may be as small as ten acres where the lands are suitable for fruit-raising, etc., but on most projects, so far, they have been fixed at from forty to eighty acres each. These areas are announced on farm unit plats, and public notice stating the amount of the charges and other details concerning payment, is issued by the Secretary of the Interior, shortly before the government is ready to furnish water. Until this public notice is issued it will be impossible in most respects to give definite information as to any particular tract or as to the details intended to be covered by such notice; but registers and receivers will, upon inquiry, give all general information relative to the public lands included in reclamation projects, and will keep the engineers of the Reclamation Service fully informed, by correspondence, as to conditions affecting the same.

Withdrawals and Restorations.—4. The withdrawal of these lands at first is principally for the purpose of making surveys and irrigation investigations in order to determine the feasibility of the plans of irrigation and reclamation proposed. Only a portion of the lands will be irrigated, even if the project is feasible, but it will be impossible to decide in advance of careful examination what lands may be watered, if any, and the mere fact that surveys are in progress is no indication whatever that the works will be built. It cannot be determined how much water there may be available, or what lands can be covered, or whether the cost will be too great to justify the undertaking until the surveys and the irrigation investigations have been completed.

5. There are two classes of withdrawals authorized by the act: One commonly known as "Withdrawals under the first form," which embraces lands that may possibly be needed in the construction and maintenance of irrigation works, and the other commonly known as "Withdrawals under the second form," which embraces lands not supposed to be needed in the actual construction and

maintenance of irrigation works, but which may possibly be irrigated from such works.

6. After lands have been withdrawn under the first form they cannot be entered, selected, or located in any manner so long as they remain so withdrawn, and all applications for such entries, selections, or locations should be rejected and denied, regardless of whether they were presented before or after the date of such withdrawal. (See John J. Maney, 35 Land Dec. 250.)

7. Lands withdrawn under the second form can be entered only under the homestead laws and subject to the provisions, limitations, charges, terms, and conditions of the Reclamation Act, and all applications to make selections, locations, or entries of any other kind on such lands should be rejected, regardless of whether they are presented before or after the lands are withdrawn.

8. Withdrawals made under either of these forms do not defeat or adversely affect any valid entry, location, or selection which segregated and withheld the lands embraced therein from other forms of appropriation at the date of such withdrawal; and all entries, selections, or locations of that character should be permitted to proceed to patent or certification upon due proof of compliance with the law in the same manner and to the same extent to which they would have proceeded had such withdrawal not been made, except as to lands needed for construction purposes. All lands, however, taken up under any of the land laws of the United States subsequent to October 2, 1888, are subject to right of way for ditches or canals constructed by authority of the United States (act of August 30, 1890, 26 Stat. 391; circular approved by department July 25, 1903). All entries made upon the lands referred to are subject to the following proviso of the act cited:

> That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian it shall be expressed that there is reserved from lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States.

9. Should a homestead entry embrace land that is needed in whole or in part for purposes contemplated by said proviso the land would be taken for such purpose, and the entryman would have no claim against the United States for the same.

10. All withdrawals become effective on the date upon which they are ordered by the Secretary of the Interior, and all orders for restorations on the date they are received in the local land

office, unless otherwise specified in the order. (George B. Pratt et al., 38 Land Dec. 146.)

11. Upon the cancellation of a homestead entry covering lands embraced within a withdrawal under the Reclamation Act such withdrawal becomes effective as to such lands without further order. (See Cornelius J. MacNamara, 33 Land Dec. 520.)

12. Where the Secretary of the Interior by the approval of farm-unit plats has determined, or may determine, that the lands designated thereon are irrigable, the filing of such plats in the General Land Office and in the local land offices is to be regarded as equivalent to an order withdrawing such lands under the second form, and as an order changing to the second form any withdrawals of the first form then effective as to any such tracts. This applies to all areas shown on the farm-unit plats as subject to entry under the provisions of the Reclamation Act or as subject to the filing of water-right applications. Upon receipt of such plats appropriate notations of the change of form of withdrawal are to be made in accordance therewith upon the records of the General Land Office and of the local land offices.

13. In the event any lands embraced in any entry on which final proof has not been offered, or in any unapproved or uncertified selection, are needed in the construction and maintenance of any irrigation works (other than for right of way for ditches or canals reserved under act of August 30, 1890) under the Reclamation Act, the government may cancel such entry or selection and appropriate the lands embraced therein to such use, after paying the value of the improvements thereon and the enhanced value of such lands caused by such improvements.

14. Uncompleted claims to lands withdrawn under the provisions of the Reclamation Act and determined to be needed for construction of irrigation works in connection with a project that has been found practicable should not be allowed to be perfected, but should remain in the same status as existed at the time the determination was made, and the rights of the claimants adjusted upon the basis of that status. (Opinion of Asst. Atty. General, 34 Land Dec. 421.) The rights of the entryman as to the measure of compensation and the character of action that may be taken by the government in acquiring or appropriating the land embraced in his entry must be determined by the status of the entry at the time of the with-

drawal of the lands for such purposes. (Agnes C. Pieper, 35 Land Dec. 459.)

15. Where the owners of the improvements mentioned shall fail to agree with the representative of the government as to the amount to be paid therefor, the same shall be acquired by condemnation proceedings under judicial process, as provided by section 7 of the Reclamation Act.

16. Inasmuch as every entry within the limits of a withdrawal under the Reclamation Act is subject to conformation to an established farm unit, improvements placed upon the different subdivisions by the entryman prior to such conformation are at his risk. (Jerome M. Higman, 37 Land Dec. 718.) They should be confined to one legal subdivision until the entry is conformed. In readjusting such an entry the secretary is not required to confine the farm unit to the limits of the entry, but may combine any legal subdivision thereof with a contiguous tract lying outside of the entry so as to equalize in value the several farm units. *(Idem.)* The act of June 27, 1906, *supra,* authorizes the Secretary of the Interior to fix a lesser area than 40 acres as a farm unit when, "by reason of market conditions and special fitness of the soil and climate for the growth of fruit and garden produce, a lesser area than forty acres may be sufficient for the support of a family," or when necessary "in order to provide for practical and economical irrigation."

Additional Entries.—17. A person who has entered and proved up on a farm unit within a project cannot make an additional entry of public lands outside of the project, nor can a person who makes entry for a unit of less than 160 acres within a project, after proving up on same, make an additional entry within the same project nor on another project. One who has made entry upon the public domain for less than 160 acres is disqualified from making an additional entry of a farm unit within a reclamation project, which farm unit is the equivalent of a homestead entry of 160 acres of land outside of the reclamation project.

18. Where, however, the first or original homestead entry was made subject to the restrictions and conditions of the Reclamation Act, any entry additional thereto would be likewise subject to the same restrictions and conditions, and in such cases additional entries may be allowed within reclamation projects under acts au-

thorizing additional entries, except where farm units have been established prior to the filing of the applications. Both entries so allowed are subject to the same adjustment to one farm unit as if the entire tract had been included in the first entry. (Henry W. Williamson, 38 Land Dec. 233.)

Contests.—19. No contest will be allowed against any entry embracing land included within the area of any first form withdrawal, and in all cases where a contest has been allowed prior to such withdrawal, the withdrawal, if made before the termination of the contest or before entry by the successful contestant, will, *ipso facto,* terminate all right that was acquired by reason of such contest.

20. Any entry of land embraced within the area of a second form withdrawal may be contested, and if at the date of entry by the successful contestant the land is under second form withdrawal, his entry will be subject to the limitations and conditions of the Reclamation Act.

Cancellation.—21. All persons holding land under homestead entries made under the Reclamation Act must, in addition to paying the water-right charges, reclaim at least one-half of the total irrigable area of their entries as finally adjusted for agricultural purposes, and reside upon, cultivate, and improve the lands embraced in their entries for not less than the period required by the homestead laws. Any failure to make any two payments when due or to reclaim the lands as above indicated, or any failure to comply with the requirements of the homestead laws and the Reclamation Act as to residence, cultivation, and improvement, will render their entries subject to cancellation and the money already paid by them subject to forfeiture, whether they have filed water-right application or not.

Widows and Heirs of Entrymen.—22. The widows or heirs of persons who make entries under the Reclamation Act will not be required both to reside upon and cultivate the lands covered by the entry of the person from whom they inherit, but they must reclaim at least one-half of the total irrigable area of the entry for agricultural purposes as required by the Reclamation Act and make payment of all unpaid charges when due and before either final certificate or patent can be issued.

23. Upon the death of a homesteader having an entry within an irrigation project, leaving no widow and only minor heirs, his right may, under section 2292, Revised Statutes, be sold for the benefit of such heirs. (See Heirs of Frederick C. De Long, 36 Land Dec. 332.) If in such case the land has been divided into farm units the purchaser takes title to the particular unit to which the entry has been limited, but if subdivision has not been made he will acquire an interest only in the land which would have been allotted to the entryman as his farm unit, in either case taking subject to the payment of the charges authorized by the Reclamation Act and regulations thereunder and free from all requirements as to residence and cultivation (*idem*).

Final Proof.—*General Information.*—24. All persons who apply to make entry of lands within the irrigable area of any project commenced or contemplated under the Reclamation Act will be required to comply fully with the homestead law as to residence, cultivation, and improvement of the land, and the failure to supply water from such works in time for use upon the land entered will not justify a failure to comply with the law and to make proof thereof within the time required by the statutes.

25. Persons who have resided upon, cultivated and improved their lands for the length of time prescribed by the homestead laws will not thereafter be required to continue such residence and cultivation, and they make final proof of reclamation at any time when they can also make proof of the necessary residence, cultivation, and improvement for five years, but no final certificate or patent will issue until all fees, commissions, and construction charges, including operation and maintenance charges due at the time of payment, have been paid in full. The entire building charge and such installments of the operation and maintenance charges as are then due may be paid at any time after the entry has been conformed to a farm unit, and prior to the time on which they otherwise fall due under the terms of the public notice.

26. Soldiers and sailors of the war of the Rebellion, the Spanish-American war, or the Philippine insurrection, and their widows and minor orphan children who are entitled to claim credit for the period of the soldier's service under the homestead laws, will be allowed to claim credit in connection with entries made under the Reclamation Act, but will not be entitled to receive final cer-

tificate or patent until all the water-right charges have been paid in full and the requirements as to reclamation have been met.

27. Upon the tendering to registers and receivers of homestead proofs in entries subject to the Reclamation Act, they will accept only the testimony fees for "reducing testimony to writing and examining and approving testimony," and will not accept final commissions payable under such entries until proof is submitted showing full compliance with all requirements of the act of June 17, 1902, including the payment of all reclamation charges.

28. To establish compliance with the clause of the Reclamation Act that requires reclamation of at least one-half of the irrigable area of an entry made subject to the provisions of the act, entrymen will be required to make proof by submitting testimony corroborated by two witnesses, showing that the land has been cleared of sagebrush or other encumbrance and leveled, that sufficient laterals have been constructed to provide for the irrigation of the required area, that the land has been put in proper condition and has been watered and cultivated and that the growth of at least one satisfactory crop has been secured thereon.

Entries Within First Form Withdrawal.—29. When the register and receiver issue final proof notices involving any lands withdrawn under the first form of withdrawal authorized by the Reclamation Act, they will at once mail a copy of such notice to the engineer in charge of the reclamation project in which the lands are situated, for report, and indorse upon the back of such notice the following: "For report within thirty days by indorsement hereon as to whether or not the within described lands or any of them are needed for construction purposes."

30. When they are informed that lands mentioned in the preceding paragraph are needed for construction purposes, final proof may be submitted as in other cases, but the proof should be at once forwarded to the General Land Office, without the issuance of final certificate, together with the report received from the reclamation engineer.

31. If report is received that none of the lands involved are needed for construction purposes, the register and receiver will consider and act on the proof in the same manner as though the lands had not been withdrawn, forwarding with the final papers the report of the reclamation engineer, and noting on the proof, "Lands not needed for construction purposes."

32. If no report is received within the thirty days, the register and receiver will send a new notice by registered mail to the reclamation engineer, allowing him twenty days to make the report referred to in paragraph 30 hereof, and if a report is received, the register and receiver will proceed as indicated in the preceding paragraphs, as the case may be. Should no report be received under this second call, nor the registered letter be returned unclaimed, they will proceed as if report had been received that the lands were not needed.

33. If the registered letter is returned unclaimed all papers will be forwarded to the General Land Office for instructions.

Forwarding of Proofs.—34. When any entryman or the heirs of any entryman apply to make final proof after all of the requirements of the homestead laws as to residence and cultivation have been complied with, the proof offered by them, if found by the register and receiver to be regular, in all cases where all of the charges have not been fully paid, will be forwarded to the General Land Office without the issuance of final certificate.

35. If any final proof offered under this act be irregular or insufficient, the register and receiver will reject it and allow the entryman the usual right of appeal; and if the General Land Office finds any proof forwarded to be fatally defective in any respect, the entryman will be notified of that fact and given an opportunity to cure the defect or to present acceptable proof.

Notice to Conform.—36. The registers and receivers are directed to notify, in writing, every person who makes final proof on a homestead entry which is subject to the limitations and conditions of the act of June 17, 1902, embracing land included in an approved farm-unit plat, where the entry does not conform to an established farm unit, and conformation notice has not already been issued, that thirty days from notice is allowed such entryman to elect the farm unit he desires to retain, in default of which the entry will be conformed by the General Land Office.

Reference to the Reclamation Service.—37. Before acting on final proof for lands entered subject to the Reclamation Act, in all cases where no public notice has issued, the Commissioner of the General Land Office will refer such cases to the Director of the Reclamation Service for report as to whether acceptance of proof

and issuance of final certificate will conflict with any contemplated reclamation operations.

Restoration of Entered Lands.—38. In such cases covered by the preceding paragraph as embrace lands in a project where the irrigation works will not be ready to furnish water for the irrigation of such land within a reasonable time, the land in question will be relieved from the withdrawal under said act provided the entryman subscribes to the Water Users' Association for the land covered by his entry in such manner as to make the same subject to a lien for the charges fixed under said act.

Action on Proofs.—39. Notice of acceptance to issue on proof of residence, cultivation, improvement, and reclamation.

Homesteaders who have resided on, cultivated, and improved their lands for the time required by the homestead laws and have reclaimed at least one-half of the irrigable area of their farm units as required by the Reclamation Act, and have submitted proof which has been found satisfactory thereunder by this office, will be excused from further residence on their lands and a notice will be issued to them reciting that the conditions of residence, cultivation, improvement, and reclamation have been complied with, and that final certificate and patent will issue upon payment of the charges imposed by the public notice issued in pursuance of section 4 of the Reclamation Act. In such cases, upon payment of the charges by the entryman, or in his behalf, final certificate and patent will issue in due course.

40. Homesteads where residence and improvement have been completed, but reclamation not effected.

Homesteaders who have resided on, cultivated, and improved their lands for the time required by the homestead laws, and have submitted proof which has been found satisfactory thereunder by this office, but who are unable to furnish proof of reclamation because water has not been furnished to the lands or farm units not established, will be excused from further residence on their lands and will be given a notice reciting that further residence is not required, but that final certificate and patent will not issue until proof of reclamation of one-half of the irrigable area of the entry as finally adjusted and payment of all charges imposed by the public notice issued in pursuance of section 4 of the Reclamation Act.

41. Notice under paragraph 39.

Notice will be given homesteaders by this office, through registers and receivers, under section 39 of this circular; that is, in cases where farm units have been established and the required residence, cultivation, improvement, and reclamation have been established by proof submitted, in the following form:

4–331a.

You are hereby advised that the five-year proof of residence, cultivation, improvement, and reclamation of one-half of the irrigable area, submitted by you on homestead entry No. .... made ....., subject to the act of June 17, 1902 (32 Stat., 388), for the ..... section ....., township ....., range ....., ... meridian has been examined by this office and found to be sufficient as to residence, improvement, cultivation, and reclamation as required by the homestead and reclamation laws. Further residence on the land is not required in order to obtain patent, and final certificate and patent will issue upon said entry upon payment to the receiver of the local land office of the entire construction charge as fixed by the Secretary of the Interior and the installments of operation and maintenance charges due at time of payment, together with the fees and commissions due.

42. Form of notice in cases falling within paragraph 40.

Notice will be given by this office, through registers and receivers, to homesteaders who have completed the five years' residence, cultivation, and improvement, but because of the fact that water has not been furnished or farm units established are unable to furnish proof of the reclamation of their lands as described in paragraph 40 hereof, in the following form:

4–331.

You are advised that the five-year proof submitted by you on homestead entry No. ...., made ..... subject to the act of June 17, 1902 (32 Stat., 388), for the ..... section ....., township ....., range ....., ... meridian, has been examined in this office and found to be sufficient as to the residence, cultivation, and improvement required by the ordinary provisions of the homestead law. Further residence on the land is not required in order to obtain patent, and final certificate and patent will issue upon proof that at least one-half of the irrigable area in the entry as finally adjusted has been reclaimed, and that the entire construction charge as fixed by the Secretary of the Interior and the installments of operation and maintenance charges due at the time reclamation is shown and payment is made, together with the fees and commissions due, have been paid to the proper receiving officer of the Government. If this entry does not conform to a farm unit as established by the Department, notice is hereby expressly given that the entry is subject to be conformed and its area thereby reduced.

Control of Sublaterals.—43. The control of operation of all sublaterals constructed or acquired in connection with projects under the Reclamation Act is retained by the Secretary of the Interior to such extent as may be necessary or reasonable to assure to the water users served therefrom the full use of the water to which they are entitled. (See 37 Land Dec. 468.)

Water-rights for Lands in Private Ownership.—44. Lands which have been patented or which were entered before the reclamation withdrawal may obtain the benefit of the Reclamation Act, but water-right applications may not be made for more than 160 acres by any one landowner, and such landowner must be an actual *bona fide* resident on such land or occupant thereof residing in the neighborhood. The Secretary of the Interior has fixed the limit of residence in the neighborhood at a maximum of fifty miles. This limit of distance may be varied, depending on local conditions. A landowner may, however, be the purchaser of the use of water for more than one tract in the prescribed neighborhood at one time, provided that the aggregate area of all the tracts involved does not exceed the maximum limit established by the Secretary of the Interior nor the limit of 160 acres fixed by the Reclamation Act; and a landowner who has made application for the use of water in connection with 160 acres of irrigable land and sold the same together with the water-right, can make other and successive applications for other irrigable lands owned or acquired by him.

Vested Water-rights.—45. The provision of section 5 of the Reclamation Act limiting the area for which the use of water may be sold does not prevent the recognition of a vested right for a larger area and protection of the same by allowing the continued flowing of the water covered by the right through the works constructed by the government under appropriate regulations and charges.

Corporation Lands.—46. Under dates of February 2, 1909 (37 Land Dec. 428), and March 3, 1909, the department held, in letters to the Director of the Reclamation Service, under section 5, act of June 17, 1902, with reference to the qualifications of a corporation to acquire a water right in pursuance of the act, that a corporation, otherwise competent, is entitled to take water under the statute, provided its home office is on or in the neighborhood of the land for which it seeks water service.

47. Further, that the corporation must show its stockholders and that as individuals they have not in the aggregate taken water-rights that, with that claimed by the corporation, will amount to more than 160 acres or the maximum limit of area established by the Secretary of the Interior. Registers and receivers are accordingly

instructed to be guided by the rulings of the department, as set forth above, in their action on water-right applications by corporations when presented.

Reclamation of Lands in Private Ownership.—48. The purpose of the Reclamation Act is to secure the reclamation of arid or semi-arid lands and to render them productive, and section 8 declares that the right to the use of water acquired under this act shall be appurtenant to the land irrigated and that "beneficial use shall be the basis, the measure, and the limit of the right." There can be no beneficial use of water for irrigation until it is actually applied to reclamation of the land. The final and only conclusive test of reclamation is production. This does not necessarily mean the maturing of a crop, but does mean the securing of actual growth of a crop. The requirement as to reclamation imposed upon lands under homestead entries shall therefore be imposed likewise upon lands in private ownership and land entered prior to the withdrawal—namely, that the landowner shall reclaim at least one-half of the total irrigable area of his land for agricultural purposes, and no right to the use of water will permanently attach until such reclamation has been shown. (See 37 Land Dec. 468.)

Cancellation of Water-right.—49. The provisions of section 5 of the Reclamation Act relative to cancellation of entries with forfeiture of rights for failure to make any two payments when due evidently states the rule to govern all who receive water under any project, and accordingly a failure on the part of any water-right applicant to make any two payments when due shall render his water-right application subject to cancellation with the forfeiture of all rights under the Reclamation Act as well as of any moneys already paid to or for the use of the United States upon any water-right sought to be acquired under said act. (37 Land Dec. 468.)

Water-right Application.[2]—50. The Department has adopted five forms of applications for water-rights, viz., Form A (4–021) for homesteaders who have made entries of lands withdrawn under the second form of withdrawal; Form A–1 (4–021a) for homesteaders who are assignees of credits paid by prior entrymen of the same lands; Form B (4–020) for private owners of lands

[2] See, also, 37 Land Dec. 521, 581.

embraced within said project; Form B–1 (4–020a) for private owners of such lands who are assignees of credits paid by prior owners of the same lands; and Form C (4–019) for Indian allottees. Copies of these forms will be furnished registers and receivers, and they will be used in all applications for water-rights in any of the reclamation projects.

51. Upon notice authorized by the Secretary of the Interior that the government is ready to receive applications for water-right for described lands under a particular project, all persons who have made entries of lands under the provisions of the act of June 17, 1902 (32 Stat. 388), will be required to file application for water-rights on Form A or Form A–1 for the number of acres of irrigable land in the farm unit entered, as shown by the plats of farm units approved by the Secretary of the Interior.

52. Upon the issuance of such notice private landowners and entrymen whose entries were made prior to withdrawal shall, in like manner, apply for water-rights for tracts not containing more than 160 acres of irrigable land, according to the approved plats, unless a smaller limit has been fixed as to lands in private ownership by the Secretary of the Interior. Form B, Form B–1, and Form C are intended for use by such applicants.

53. Each application on Form B, Form B–1, or Form C must contain a statement as to the distance of the applicant's residence from the land for which a water-right is desired.

If a greater distance than that fixed for the project is shown in any application, the case should be reported to the Commissioner of the General Land Office for special consideration upon the facts shown. If the applicant is an actual *bona fide* resident on the land for which water-right application is made, the clause in parentheses of Form B, Form B–1, or Form C, regarding residence elsewhere, must be stricken out.

54. The applicant on Form B, Form B–1, or Form C must state accurately the nature of his interest in the land. If this interest is such that it cannot ripen into a fee-simple title at or before the time when the last annual installment for water-right is due, the register and receiver must reject the application.

55. In order to avoid discrepancies in areas and resulting payments and the acceptance of applications for tracts not designated as lands for which water can be furnished, the following instructions are issued:

(a) When practicable, all applications for water-rights, both by homesteaders who have made entries of lands withdrawn and by private owners of lands embraced within a reclamation project, should be submitted by the applicants to the project engineer, United States Reclamation Service, for his examination and approval, before the applications are filed in the local land offices. In such cases the project engineers will indorse their approval upon the application forms if found correct, or point out defects and suggest corrections if any are required.

(b) Where, because of lack of time, distance, or necessity of submitting the water-right applications with applications to make original homestead entries, etc., it is not practicable to have the water-right applications examined and approved by the project engineer prior to the filing in the local land office, the water-right applications must be executed and filed in the local land office in duplicate. Registers and receivers will suspend action in such cases and daily forward to the proper project engineer one copy of each of such water-right applications for examination and return by the engineer within fifteen days, approved by him, or with defects indicated and corrections suggested if not in form for approval. In the latter case the applicant should be promptly advised and allowed thirty days to make the necessary amendments, in default of which the application will be rejected.

(c) The Reclamation Service will advise its project engineers that their approval will be regarded as certifying to the correctness of the following matters: *(a)* That the land described is subject to water-right application under the project; *(b)* that the irrigable acreage shown is correct in accordance with the public notices, the official plats, and instructions approved by the Secretary of the Interior; *(c)* that the number of acre-feet per annum to be furnished is correctly stated; *(d)* that the amount of the building charge is correctly stated; *(e)* that the number of annual installments is correctly stated.

(d) These regulations are designed to aid the applicants in presenting water-right applications which will be correct in form and which contain matters essential to the approval of their applications; also, to aid the registers and receivers of local land offices in the consideration of such application; and registers and receivers are, therefore, enjoined to use both care and diligence in enforcing the above requirements.

(c) If the Secretary of the Interior has made a contract with a water users' association organized under the project, due notice thereof will be given to the registers and receivers, and applications for water rights should not be accepted in such cases unless the certificate at the end thereof has been duly executed by the said association.

56. The following rules are laid down with reference to water-right applications for land in private ownership, including entries not subject to the Reclamation Act.

I. Where water-right application is presented covering only part of the irrigable area of a subdivision in private ownership the register and receiver will accept it provided it bears the usual certificates of the project engineer and the local water users' association (where such association has been formed).

II. In case of sale by a private owner of part of the irrigable land covered by a subsisting water-right application, the vendor, in order to have his water-right charges adjusted to the reduced acreage retained by him, will be required to present the following evidence:

(a) Certificate of the proper officer having charge of the county records, showing record of a subscription for stock in the local water users' association covering the land in question and that the land has been duly conveyed by the subscriber at a time subsequent to the recording of the stock subscription.

(b) The certificate of the local water users' association, if one has been organized on the project, under corporate seal, to the effect that proof has been presented to the association of the transfer of the land to the person named and that appropriate transfer has been made on its books of the shares of stock appurtenant to said land.

(c) The vendor should also so arrange that his vendee shall promptly make a water-right application for the irrigable land within the tract conveyed to him, and upon presentation and acceptance of such application appropriate notation of such transfer, with a reference to the new water-right application, will be made on the original or prior water-right application.

III. In case of relinquishment by an entryman, whose entry is not subject to the Reclamation Act, of a part of the land included in his entry, appropriate notation will be made on his water-right

application, showing such relinquishment, and his charges will be reduced accordingly.

IV. Where an entryman relinquishes a part of his entry under conditions described in paragraph III hereof, and the next person who enters the land so relinquished claims credit for installments paid by the first entryman, he must at the time of such entry file with his application to enter evidence showing that he is entitled to such credit; also a water-right application covering the land entered.

57. In order that there may be no unnecessary delay in the obtaining of water by entrymen and landowners in reclamation projects, after they have filed water-right applications and made the required preliminary payment, attention is directed to the instructions issued with each public notice respecting such lands, to the effect that the register and receiver are to issue in triplicate certificates of water-right applications accepted, furnishing one copy to the applicant and mailing one copy to the engineer in charge of the reclamation project, and that at the end of each month they are to prepare a schedule, Form 4–115b, of certificates issued upon water-right applications accepted during the month, and an abstract, Form 4–105b, of collections of charges made during the month, forwarding the original in triplicate to this office and furnishing the Director of the Reclamation Service and the project engineer with copies of each monthly schedule of certificates and abstract of collections made. Receipts made from the sale of townsite lots should be reported separately on Form 4–105 for payment into the reclamation fund as original receipts on account thereof.

58. *The copies of certificates of water-right applications accepted must be forwarded, on the day issued, to the engineer in charge of the reclamation project* wherein the lands are situated, and the monthly abstract of collections must be prepared and copy forwarded to him *immediately after the close of the month during which the collections were made.*

59. As above indicated, prompt action is essential in these matters in order that the applicants who are entitled to water may receive same at the *earliest possible moment;* and any dereliction in furnishing the copies of certificates and abstracts above indicated will be considered a failure of satisfactory performance of duty.

Water-right Charges.[3]—60. The Secretary of the Interior will at the proper time, as provided in section 4 of the Reclamation Act, fix and announce the area of lands which may be embraced in any entry thereafter made or which may be retained in any entry theretofore made under the Reclamation Act; the amount of water to be furnished per annum per acre of irrigable land and the charges which shall be made per acre for the lands embraced in such entries and lands in private ownership, for the estimated cost of building the works and for operation and maintenance, and prescribe the number and amount and the dates of payment of the annual installments thereof.

61. The charges assessed against lands entered under this act attach to the lands themselves while so embraced in entries, and as annual installments thereof accrue they become fixed charges on the land in the nature of a lien. If any entry is canceled by reason of relinquishment, all annual installments due and unpaid on the relinquished entry at the date of its cancellation must be paid at the time of filing application to enter by any person who thereafter enters the land.

62. A person who has entered lands under the Reclamation Act, and against whose entry there is no pending charge of noncompliance with the law or regulations, or whose entry is not subject to cancellation under this act, may relinquish his entry and assign to a prospective entryman any credit he may have for payments already made under this act on account of said entry, and the party taking such assignment may, upon making proper entry of the land and proving the good faith of the prior entryman to the satisfaction of the Commissioner of the General Land Office, receive full credit for all payments thus assigned to him, but must otherwise comply in every respect with the homestead law and the Reclamation Act.

63. All charges due for operation and maintenance of the irrigation system for all the irrigable land included in any water-right application must be paid on or before April 1 of each year, except where a different date is specified in the orders relating to the particular project, and in default of such payment no water will be furnished for the irrigation of such lands.

Regulations as to the Collection of Reclamation Water-right Charges by Receivers of Public Moneys.—64. In accordance with

[3] See, also, 39 Land Dec. 2; 39 Land Dec. 351.

the provisions of section 5 of the Reclamation Act, all payments of the annual installments of reclamation water-right charges, including the portions for building charges and operation and maintenance charges on reclamation water-right applications, shall be made to the receivers of public moneys of the respective local land districts, *but,* for the convenience of the water-right applicants, the charges provided may be tendered to and received by the designated special fiscal agents for the several irrigation projects for transmission by them to the proper receivers of public moneys. The acceptance of these water-right charges by the fiscal agents of the Reclamation Service cannot be held to be a payment to the United States in accordance with the requirements of section 5 of the Reclamation Act until the moneys are actually in the hands of the proper receivers of public moneys. The permission granted above is only for the convenience of water-right applicants, but care will be taken to properly safeguard the handling of such funds until their receipt by the respective receivers of public moneys.

65. Receivers should not accept a payment for either a part of that portion of the annual installment due representing building charges, or payment of a part of that portion representing operation and maintenance charges. Receivers should accept only tenders which are for the full amount of either portion of the annual installment; but nothing herein contained shall operate to prevent the payment at one time of all installments due. Payment of a part of the amount due on either class of charges should be refused.

66. When full payment is tendered direct to the receiver of public moneys, and upon examination is found to be correct, the receiver will issue the usual receipt.

67. Where payment is tendered through special fiscal agents of the Reclamation Service, and, upon examination, the amounts so transmitted by the special fiscal agent are found to be correct, the receiver will then issue the usual receipt and transmit the same to the water-right applicant at his record post-office address. The receiver will receipt to such special fiscal agent upon one copy (and retain the other copy) of the "Abstract of receipts of reclamation water-right charges (R. S., Form 7–406)" received from the special fiscal agent at the end of each month. See section 8 of instructions of May 27, 1908, to special fiscal agents, by the United States Reclamation Service.

68. Attention is invited to paragraph 4 of "Circular of instructions to special fiscal agents by the United States Reclamation Service," dated May 27, 1908, and in accordance therewith receivers of public moneys will require payment direct to themselves in all matters involving tenders for fees on homestead entries; tenders for first installments on water-right applications, including both the portion for building and the portion for operation, and maintenance charges where the public notices require the first installment to be paid at the time of filing homestead entries, and tenders upon water-right applications where a notice of contest against the entry upon which the water-right application rests, has been reported by the register of the land office. In all such cases payments must be made direct to the receiver of public moneys.

69. All moneys collected in connection with water-right applications, both those received direct from water-right applicants and through special fiscal agents, must be deposited in receivers' designated depositories to the credit of the Treasurer of the United States "on account of *reclamation fund, water-right charges.*"

Desert Land Entries Within a Reclamation Project.—70. By section 5 of the act of June 27, 1906 (34 Stat. 519), it is provided that any desert land entryman who has been or may be directly or indirectly hindered or prevented from making improvements on or from reclaiming the lands embraced in his entry, by reason of the fact that such lands have been embraced within the exterior limits of any withdrawal under the Reclamation Act of June 17, 1902, will be excused during the continuance of such hindrance from complying with the provisions of the desert land laws.

71. This act applies only to persons who have been, directly or indirectly, delayed or prevented, by the creation of any reclamation project or by any withdrawal of public lands under the Reclamation Act, from improving or reclaiming the lands covered by their entries.

72. No entryman will be excused under this act from a compliance with all of the requirements of the desert land law until he has filed in the local land office for the district in which his lands are situated an affidavit showing in detail all of the facts upon which he claims the right to be excused. This affidavit must show when the hindrance began, the nature, character, and extent of

the same, and it must be corroborated by two disinterested persons, who can testify from their own personal knowledge.

73. The register and receiver will at once forward the application to the engineer in charge of the reclamation project under which the lands involved are located and request a report and recommendation thereon. Upon the receipt of this report the register and receiver will forward it, together with the applicant's affidavit and their recommendation, to the General Land Office, where it will receive appropriate consideration and be allowed or denied, as the circumstances may justify.

74. Inasmuch as entrymen are allowed one year after entry in which to submit the first annual proof of expenditures for the purpose of improving and reclaiming the land entered by them, the privileges of this act are not necessary in connection with annual proofs until the expiration of the years in which such proofs are due. Therefore, if at the time that annual proof is due it cannot be made, on account of hindrance or delay occasioned by a withdrawal of the land for the purpose indicated in the act, the applicant will file his affidavit explaining the delay. As a rule, however, annual proofs may be made, notwithstanding the withdrawal of the land, because expenditures for various kinds of improvements are allowed as satisfactory annual proofs. Therefore an extension of time for making annual proof will not be granted unless it is made clearly to appear that the entryman has been delayed or prevented by the withdrawal from making the required improvements; and, unless he has been so hindered or prevented from making the required improvements, no application for extension of time for making final proof will be granted until after all the yearly proofs have been made.

75. An entryman will not need to invoke the privileges of this act in connection with final proof until such final proof is due, and if at that time he is unable to make the final proof of reclamation and cultivation, as required by law, and such inability is due, directly or indirectly, to the withdrawal of the land on account of a reclamation project, the affidavit explaining the hindrance and delay should be filed in order that the entryman may be excused for such failure.

76. When the time for submitting final proof has arrived, and the entryman is unable, by reason of the withdrawal of the land, to make such proof, upon proper showing, as indicated herein, he

will be excused, and the time during which it is shown that he has been hindered or delayed on account of the withdrawal of the land will not be computed in determining the time within which final proof must be made.

77. If after investigation the irrigation project has been or may be abandoned by the government, the time for compliance with the law by the entryman will begin to run from the date of notice of such abandonment of the project and of the restoration to the public domain of the lands which had been withdrawn in connection with the project. If, however, the reclamation project is carried to completion by the government and a water supply has been made available for the land embraced in such desert land entry, the entryman must comply with all the provisions of the act of June 17, 1902, and must relinquish all the land embraced in his entry in excess of 160 acres; and upon making final proof and complying with the terms of payment prescribed in said act of June 17, 1902, he shall be entitled to patent.

78. Special attention is called to the fact that nothing contained in the act of June 27, 1906, shall be construed to mean that a desert land entryman who owns a water-right and reclaims the land embraced in his entry must accept the conditions of the Reclamation Act of June 17, 1902, but he may proceed independently of the government's plan of irrigation and acquire title to the land embraced in his desert land entry by means of his own system of irrigation.

79. Desert land entrymen within exterior boundaries of a reclamation project who expect to secure water from the government must relinquish all of the lands embraced in their entries in excess of 160 acres whenever they are required to do so through the local land office, and must reclaim one-half of the irrigable area covered by their water-right in the same manner as private owners of land irrigated under a reclamation project.[4]

[4] See, also, circulars of September 13, 1910, and December 17, 1910, regarding leave of absence.

CHAPTER 62.

WATER USERS ASSOCIATIONS UNDER THE RECLAMATION SERVICE.

§ 1409. Sources of information.
§ 1410. Nature of Water Users Associations.
§ 1411. Articles of incorporation and by-laws.
§ 1412. Stock subscriptions and certificates.
§ 1413. Assessments.
§ 1414. Private holdings—Excess lands.
§ 1415. Contract with Secretary of the Interior.
§ 1416. Completion of organization.
§ 1417. Water-rights applications.
§ 1418. Miscellaneous.
§§ 1419–1427. (Blank numbers.)

(3d ed.)

§ **1409.** The following information is mostly taken, with but few changes, from circulars issued by the Department of the Interior and the Reclamation Service; following which, in a separate chapter, is an article by Mr. Morris Bien, Supervising Engineer and at times Acting Director of the Reclamation Service.

(3d ed.)

§ **1410. Nature of Water Users Associations.**—Under sections 5 and 10 of the Reclamation Act, the Secretary of the Interior is authorized to make necessary rules and regulations for supplying water to lands in private ownership, and pursuant thereto the Reclamation Service requires that as soon as the engineering examinations and surveys have proceeded to the point where the feasibility of the government project from a physical standpoint is assured, an organization shall be effected by private landowners in the vicinity, which organizations are called "water users associations," and must be organized under the forms and method prescribed by the Reclamation Service.

The water users associations organized under the general power of the Secretary of the Interior to prescribe rules and regulations are not the specific organization mentioned in section 6 of the Reclamation Act. That section provides that when the major portion of the irrigated land has fully paid up its share of the cost

of the works (it being the intention of the act that ultimately the cost of the irrigation projects shall be repaid to the United States by the water users), then the control of the works shall pass from the United States to the water users themselves "under such form of organization . . . . as may be acceptable to the Secretary of the Interior." As yet, no project is so far advanced that the time for such final organization has arrived, and the "water users associations" now being organized are not regarded by the Secretary of the Interior as being specifically the organization mentioned in section 6 of the act. But the aim has been to make the present associations readily adaptable to the duties required in section 6, to avoid, as far as possible, fundamental changes when the time arrives for turning over the irrigation works to the irrigators' final organization.

Charges against private land may be imposed without waiting for the time when the works are to be turned over to consumers.[1]

Proceedings for organization of water users' associations, and their internal affairs after organization, are governed by State law.[2]

The procedure follows local State law. Some States have passed special statutes for their organization.[3]

(3d ed.)

§ 1411. **Articles of Incorporation and By-laws.**—A committee should be appointed by the people in the vicinity of any project (preferably at a mass-meeting) to take the preliminary steps. Articles of incorporation of the water users association and by-laws should be drawn up, forms for which are issued by the Reclamation Service. The official form must be strictly followed in all provisions relating to the adjustment of water-rights, regulation and distribution of water, appurtenance of water to the land, and liens on the land for charges of construction work.

The articles of incorporation are to contain the provisions customarily used under the local law to constitute a corporation. The by-laws proposed for the organization are divided into two parts; article I contains the essential provisions required by the conditions of the Reclamation Act, which are to be subject to modifica-

1 United States v. Cantrall (Or.), 176 Fed. 949.

2 Umatilla W. U. Assn. v. Irwin (Or. 1910), 108 Pac. 1016.

3 See *supra*, secs. 134, 1395; *infra*, sec. 1418.

tion or amendment only with the approval of the Secretary of the Interior. The other articles provide for the government of the association and the conduct of its business and will be subject to modification as may be necessary. Additional articles will be adopted from time to time as they may be required. Those matters in the articles and by-laws which relate to the government of the association, the number of its officers, and the conduct of its business may be modified as found necessary on account of local conditions or the local laws or decisions of the courts.

Inasmuch as the contract which the association will make with the Secretary of the Interior before the construction of the project begins requires that no change shall be made in the provisions of its articles of incorporation and by-laws relating to water-rights, appurtenance, liens, etc., without the consent of the Secretary of the Interior, it is necessary to incorporate in the articles and by-laws a similar provision concerning change, unless the local laws do not permit. In such case, these features must be left to be fixed by the contract between the water users association and the Secretary of the Interior.

When the articles of incorporation and by-laws have been formulated to the satisfaction of the committee, a copy should be forwarded to the chief engineer of the Reclamation Service for examination, in order that they may be modified, if necessary, so that they will conform to the requirements of the Secretary of the Interior, and that the committee may receive the benefit of the experience of other localities. The committee will be immediately informed of any changes deemed important.

(3d ed.)

§ 1412. **Stock Subscriptions and Certificates.**—After the articles of incorporation have been filed with the proper State officer, one or more mass-meetings should be called, as may be necessary, to bring together all the people interested. At these meetings the articles and by-laws should be fully discussed and subscriptions to the stock obtained from those present. Before construction work can be undertaken it is necessary to obtain a sufficient number of subscriptions for lands in private ownership to insure financial success. The subscriptions should provide for acknowledgment by both husband and wife, even in States where there is no right of dower, and where in ordinary conveyances the wife is not required to join, in order that her signature may be obtained in

case a homestead exemption has been declared. If any land subscribed is subject to a homestead exemption, the subscription to stock must be executed in such manner as will permit the lien therein provided to attach to the land. The subscription should not be accepted unless it includes all the land under the project owned by the subscriber. A careful soil examination of the land will be made, and all shares representing nonirrigable land will be eliminated. Ample provision is made in the by-laws for refunding any assessments collected on shares which are afterward canceled.

The subscriptions must be recorded, in order to bind the lands subscribed for in the hands of a subsequent transferee of the land. In most of the States legislation has been enacted to facilitate this recording at a minimum expense.

The association will issue certificates of stock when the Secretary of the Interior has finally determined the extent of land irrigable from the project. These certificates of stock should recite the matters required by the articles of incorporation and the by-laws, and should also contain a statement of the procedure adopted to enforce the lien against the land for which the subscription was made.

When it has been decided to begin construction of the project, the next step to be taken by the water users association is to close its subscription books. It will be necessary for the association to give public notice that after a certain date no further subscriptions will be accepted, except at the designation of the Secretary of the Interior, and pursuant to the conditions in the articles and by-laws.

(3d ed.)

§ **1413. Assessments.**—It is the duty of the water users association to levy calls and assessments as may be found necessary for meeting the current expenses of the association, and also for the collection of the amounts due on the shares of stock as may be required by the United States in connection with water-right applications hereafter mentioned. In order that the association may carry on its business, small assessments must be levied during the early stages of its organization, usually five to ten cents per acre from time to time to meet current expenses. Only those who pay assessments are entitled to vote in Oregon.[4]

[4] Umatilla etc. Assn. v. Irwin (Or.), 108 Pac. 1016.

If the local law permits, there is no objection to a by-law making all new subscribers subject to all assessments levied prior to their subscription, and providing also for the levy of fines upon delinquents and admission fees for those subscribing after the books are closed.

The by-laws provide that assessments are a lien upon the lands and shares of the stockholders, and prescribe the method of enforcing the same, and the association is expected to take action, when necessary, in pursuance of the requirements.

(3d ed.)

§ **1414. Private Holdings—Excess Lands.**—Subscribers who own lands in excess of the area for which water will be furnished to lands in private ownership should, for convenience in transferring stock, make one subscription for the tract which they propose to hold under the project and one or more other subscriptions for their other holdings, conforming to the subdivisions in which it is proposed to sell them. Those who own lands under the project in excess of one hundred and sixty acres are required to dispose of the excess so that at the time when the water is furnished no one person holds more than one hundred and sixty acres of irrigable land. They may, under some projects, be required to reduce their holdings to such less area as may be fixed by the Secretary of the Interior.

In order to insure this adjustment it will be necessary for such persons to execute a contract with the water users association providing for the subdivision of their lands. In general terms, this contract is a transfer of the land in trust to the water users association with power in the association to sell the same at public auction in case it has not been sold to parties qualified to apply for a water-right under the provisions of the Reclamation Act, when water is ready for delivery by the United States. A copy of the form of contract used for this purpose can be obtained from the Reclamation Service.

It is not intended that there shall be any restriction on transfers by the owners of these lands through the water users association, even though the purchaser may not himself be qualified to apply for a water-right under the Reclamation Act, subject, however, to the condition that at the time the United States is ready to furnish water the lands shall be in possession of parties qualified to apply

for and perfect a water-right. A form of deed is given by the Reclamation Service for use in transferring the land and providing for continuance of the trust notwithstanding such transfer. Under the terms of the trust deed the conditions of the trust remain in effect until the acceptance of an application for water-right duly made by a qualified holder of the land. When the trust has been fulfilled and after payment of all costs and expenses of the trust, the association may execute a quitclaim deed in favor of a qualified holder or holders. All deeds should be recorded.

(3d ed.)

§ 1415. Contract With Secretary of the Interior.—After closing subscription-books, a contract is executed between the association and the Secretary of the Interior, in a form furnished by the Reclamation Service, which is adaptable to any project with a few changes, and which must be executed before construction work will begin. Under this contract the association guarantees payment to the government of costs of construction, operation and maintenance, levied against the association's members, being a large sum annually. The incurring of this obligation by the association requires a vote of the stockholders; and proper by-laws must be adopted for regulating such stockholders' meeting, and proper notice of the meeting given, as the articles and by-laws provide.

The form of contract furnished by the Reclamation Service has received the approval of the Secretary of the Interior, and no changes should be made, as they might involve a refusal on the part of the secretary to execute the same, and thus make necessary another stockholders' meeting and perhaps delay the beginning of construction. Before the election to authorize the contract is announced, a copy of the proposed form of contract should be forwarded to the chief engineer, in order that it may be carefully examined and the association advised as to its compliance with the requirements of the Secretary of the Interior.

After the meeting has been held and the contract has been authorized by the stockholders, the same should be executed in duplicate by the proper officers of the association, and there should be attached to each a copy of the articles of incorporation and by-laws both duly certified under seal of the corporation. There should also be copies of the notices to and of the proceedings by the stockholders, authorizing the execution of the contract, and of the pro-

ceedings by the board of directors authorizing the signature of the contract by the appropriate officers. The secretary of the association should certify, under corporate seal, that the association is duly organized and that a certificate of incorporation has been issued to the association by the Secretary of State. In other words, the paper should contain complete evidence that the contract has been duly authorized and executed in full compliance with the articles of incorporation and by-laws.

The contract, articles of incorporation, by-laws and evidence of the procedure authorizing the contract should be prepared in duplicate as two separate documents, both of which should be executed under the seal of the corporation and forwarded through the project engineer to the chief engineer, who will transmit the same to the Secretary of the Interior for execution, if found in proper form. After the Secretary of the Interior has signed them, one of the executed copies will be returned to the water users association. The contract should be recorded.

(3d ed.)

§ 1416. **Completion of Organization.**—The execution of the contract between the water users association and the Secretary of the Interior may be regarded as the completion of the organization of the water users association. At the time it becomes, as it were, an integral part of the project and directly associated with the government in carrying out the details thereof, and in the acquisition of land and the condemnation of rights and property which may be required in connection with projects. The execution of this contract formally fixes the relation of the association to the government as the representative of the water users and as the medium of communication between the water users and the government.

(3d ed.)

§ 1417. **Water-right Applications.**—The Secretary of the Interior has approved two forms of water-right applications, one for homesteaders and one for private landowners. These forms provide that all applicants must be members of the association organized under the project before their applications will be accepted. In accordance with the agreement in the stock subscription, the members of the association must promptly apply for water-rights for the lands represented by their shares.

(3d ed.)

§ **1418. Miscellaneous.**—Users of water under the Carey Act may join a water users association and be entitled to receive additional water.[5] Water users associations, it has been held, may acquire rights by condemnation.[6]

Many States have enacted statutes in aid of the Federal Reclamation Service and of water users associations under it.[7]

[5] 35 Land Dec. 222.

[6] Lee v. Salt River Valley Water Users Assn. (Ariz.), 90 Pac. 1130.

[7] *California.*—Stats. 1905, p. 152, c. 157; Stats. 1907, cc. 161, 407, 461, 848; Deering's Gen. Laws, Act 2983.

Colorado.—Stats. 1905, p. 360; 3 M. A. S., 3d ed., sec. 491, s, t.

Idaho.—Rev. Codes, secs. 2842, 2843; Laws 1905, p. 373; Laws 1911, c. 9 (Sen. Bill 56).

Montana.—Stats. 1905, c. 44, p. 80; Stats. 1905, c. 53, p. 116; Stats. 1905, c. 66, p. 150; Stats. 1909, p. 86.

Nebraska.—Laws 1905, p. ——, sec. 1; Cobbey's Ann. Stats., sec. 6894.

Nevada.—Stats. 1901, p. 72; Stats. 1903, p. 18; Stats. 1905, pp. 66, 93, 197; Stats. 1907, p. 30, sec. 10.

New Mexico.—Laws 1905, c. 15, p. 43; Laws 1907, c. 49. See Laws 1909, p. 195.

North Dakota.—Stats. 1905, c. 193, sec. 14, *et alia;* Stats. 1905, c. 34, pp. 54, 59.

Oklahoma.—Laws 1905, c. 21, pp. 287, 296.

Oregon.—Stats. 1905, p. 401; Stats. 1911, c. 71, p. 110.

South Dakota.—Laws 1905, c. 132, p. 209, sec. 36; Laws 1907, c. 180, p. 384, sec. 37; Laws 1909, p. 155.

Texas.—Laws 1911, c. 30, p. 42.

Utah.—Laws 1905, c. 115, p. 177, sec. 2.

Washington.—Pierce's Code, sec. 5903; Stats. 1905, p. 180, c. 88.

See, also, statutes cited *supra,* sec. 1395.

§§ *1419–1427. (Blank numbers.)*

CHAPTER 63.

WATER USERS ASSOCIATIONS (CONTINUED).[1]

By Morris Bien.

Supervising Engineer, United States Reclamation Service.

Section 6 of the Reclamation Act of June 17, 1902,[2] provides that when payments required by the act have been made for the major portion of the lands irrigated in any project then the management and operation of such works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense, under such form of organization, and under such rules and regulations as may be acceptable to the Secretary of the Interior. This provision of the law contemplates the organization of the water users so that they may maintain and operate the irrigation works turned over to them by the United States.

Neither this section nor any other provision of the law authorizes the Secretary of the Interior to transfer the title of these works to the water users associations. The final proviso of section 6 explicitly states that the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the government until otherwise provided by Congress. While it might be inferred from this language that the title to the diversion and distribution works is to be transferred, the act does not authorize it. This possible conception is due to the fact that the various drafts of the bill provided for the retaining of title by the United States, and in the final adjustment of the language, this proviso which was intended to qualify language which had been stricken out of the bill was left in its present form.

The Reclamation Act leaves with the Secretary of the Interior a large discretion as to administrative details. When it was found

[1] Mr. Morris Bien, Supervising Engineer of the United States Reclamation Service, has kindly prepared specially for this book the following chapter upon Water Users Associations, treating of numerous matters not contained in the official circulars from which the preceding chapter was taken. The field is an entirely new one, in which Mr. Bien occupies a position of recognized authority.

[2] 32 Stat. 388. Printed *infra*, sec. 1428.

that several of the early projects taken up for construction contained considerable proportions of land in private ownership and involved complicated questions of water-rights, it became necessary to devise a form of co-operation by which the Secretary of the Interior could deal with the landowners as a unit instead of being required to deal with numerous individuals. It was natural, therefore, that the provisions of section 6 should furnish the suggestion for a water users association to be incorporated at once as preliminary to the organization contemplated by the law at a later period.

The details of this question were thoroughly discussed during a period of nearly a year by the waters users in the vicinity of Phoenix, Arizona, under the Salt River project, and resulted in the organization of a corporation named The Salt River Valley Water Users Association.

The articles of incorporation were the outcome of a thorough analysis and discussion of the much involved water-right conditions in that valley. They represent a series of adjustments and compromises and harmonize many complications of land ownership and water-right claims. These articles of incorporation are set out in full in the second annual report of the Reclamation Service, pages 76–87, inclusive.

This plan was carefully reviewed by the officers of the Reclamation Service, and finally received the sanction of the Secretary of the Interior as representing the adopted form of dealing with projects in which there existed a considerable proportion of private land involving water-right claims. It is a form of regulation for the tentative organization of the water users under reclamation projects. Several corporations of this character were organized on reclamation projects in the year 1903.

It was soon found, however, that the plan adopted as suitable in Arizona and in several of the States could not be followed in all cases because of the varying features of the State laws governing corporations. Accordingly, the Reclamation Service remodeled this plan and divided the articles of incorporation as previously outlined into two parts. The first part is the articles of incorporation following the usual form of the various States and Territories, containing only the features required by law to be specified in such articles. The second part constitutes the by-laws and prescribes the internal administration and the relations of the stock-

holders to each other and to the government in the matter of water-rights and the other features required in order to comply with the provisions of the Federal Reclamation Act.

The first of these by-laws contains those features which are essential in order to conform to the requirements of the Federal statute. This article contains a form of stock subscription which is essentially a contract between the subscriber and the corporation, by which the former agrees to the necessary restrictions and conditions flowing from the relations of the individuals and the corporation to the United States as required by the Reclamation Act. This article is by agreement not subject to change without consent of the Secretary of the Interior. The remainder of the by-laws concern principally the government of the corporation, and are similar to other by-laws of corporations.

The form of articles of incorporation and the first article of the by-laws are as follows:

ARTICLES OF INCORPORATION OF THE . . . . . WATER USERS ASSOCIATION.

Know all men by these articles of incorporation:

That we, the undersigned, have associated ourselves together under the laws of the ..... of ..... as a body incorporate.

ARTICLE I.

The name of the corporation shall be and is ..... Water Users Association.

ARTICLE II.

The names of the incorporators are: ....., but others may become members of this association by subscribing for the stock of this association or by the transfer of stock to them in the regular course of the administration of the affairs of the association.

ARTICLE III.

The principal place of transacting the business of the association shall be at ....., in the county of ....., in the ..... of .....

ARTICLE IV.

The purposes for which this association is organized and the general nature of the business to be transacted are:

To acquire, furnish, provide for, and distribute to the lands of the shareholders of the association, an adequate supply of water for the irrigation thereof; to divert, store, develop, pump, carry and distribute water for irrigation and all other beneficial uses, deriving the same from all available sources of supply; to construct, purchase, lease, condemn, or acquire in any manner whatsoever, and to own, use, sell, transfer, convey, control, maintain and operate any irrigation works, structures, telephone systems, electric or other power plants and transmission lines and property both real and personal of every kind whatsoever, necessary to or appropriate for the accomplishment of any of the purposes of this organization; to generate, create, transmit, use, and sell power and electrical energy; to act as trustee, agent, or attorney for the sale, disposal, and transfer of lands, in order to facilitate the disposal of such lands, or any part thereof, to persons qualified to perfect rights to the use

of water under the laws of the United States applicable thereto, and the rules and regulations established thereunder; to incur indebtedness, floating or bonded, and to secure the same by mortgage, deed of trust, pledge, or otherwise; to acquire, hold, and dispose of stock in other corporations, domestic or foreign; to have and exercise all the powers and to perform any and all acts necessary to or appropriate for the accomplishment of any one or more of the said purposes or anything incident thereto, or which shall at any time appear conducive or expedient for the protection or benefit of the association or its shareholders, and to that end enter into any contract, agreement, or other arrangement with the proper representative of the United States, or any individual, association of individuals, or corporation, for the accomplishment of any of the aforesaid purposes, by means of the construction, acquisition, or control of appropriate works or structures, or in any other manner whatsoever; to enter into any agreement with the proper representatives of the United States with reference to the collection and payment of any and all charges made under the Federal statutes, for the works providing water for the lands of its shareholders, and to comply with the provisions of any Federal statutes applicable to the work done by the United States in connection with such system of water supply, and any rules and regulations established thereunder.

ARTICLE V.

The capital stock of the association shall be $..... divided into ..... shares, of the par value of $ ..... each, and said stock shall be assessable.

ARTICLE VI.

This corporation shall endure for the term of ..... years.

ARTICLE VII.

SECTION 1. The exercise of the corporate powers of this association and the management of its affairs shall be vested in seven[3] directors, elected to serve one year; and a president and vice-president, each elected to serve two years. The president and vice-president shall be ex-officio members of the board of directors. The board shall annually elect a secretary and a treasurer.

SEC. 2. Until the election in 190.... and the qualification of those then elected, the following shall be the president, vice-president, and directors of this association: ....

ARTICLE VIII.

The individual property of the shareholders shall be exempt from liability for the corporate indebtedness of this association, except as provided herein or in the by-laws.

ARTICLE IX.

The corporate indebtedness shall not exceed two-thirds of the amount of the capital stock.

ARTICLE X.[4]

The amount of the capital stock of this corporation that has been actually subscribed, and the number of shares subscribed by each subscriber, and the par value thereof, are as follows:

[3] If the president and vice-president are elected at large, this makes a board of nine, which would be too large, except for a project containing at least 200,000 acres; for smaller projects the number of directors should be reduced; three directors, with the president and vice-president, will make a satisfactory board for a project of 60,000 to 100,000 acres.

[4] The articles should contain such additional provisions as may be made necessary by State or Territorial law.

NAME OF SUBSCRIBER.	NUMBER OF SHARES.	PAR VALUE.
.....	.....	.....
.....	.....	.....

BY-LAWS OF THE . . . . WATER USERS ASSOCIATION.

[Adopted .....]

ARTICLE I.

SECTION 1. The territory within which the lands to be irrigated are situated, to be known as the ..... irrigation district, includes all such lands within ..... counties, State of ..... as may be included in the reclamation project of the United States known as the ..... project, as finally approved by the Secretary of the Interior.

SEC. 2. Only those who are owners of lands, or occupants of public lands having initiated a right to acquire the same, within the area described in section 1, or within such extensions thereof as may be duly made, shall be qualified to own the shares of this association. One share and no more shall be allotted for each acre of land, or fraction thereof.

SEC. 3. Each share and the holder thereof shall be subject to the conditions of the form of stock subscription and contract hereinafter prescribed, and shall execute such form for the stock subscribed by him, and no subscriptions for stock shall be taken or stock issued unless the applicant has subscribed to said form of stock subscription and contract, which shall be signed, executed and acknowledged by the applicant in the same manner as required for the execution and acknowledgment of deeds for the conveyance of real property. Said form of stock subscription and contract shall be as follows:

STOCK SUBSCRIPTION AND CONTRACT.

Know all men by these presents, That I, ..., do hereby subscribe for and agree to take ..... shares of the capital stock of the ..... Water Users Association, a corporation duly organized under the laws of the State [or Territory] of ....., and in conformity with the articles of incorporation and by-laws of said association and in consideration of the benefits to be received therefrom, I hereby covenant and agree as follows:

1. The said shares of stock and all rights and interests represented thereby or existing or accruing by reason thereof, or incident thereto, are to be inseparably appurtenant to the following described real estate, that is to say:

....

2. The undersigned hereby agrees that the right to any water heretofore appropriated by him, or his predecessors in interest, for the irrigation of the lands above described or customarily used thereon, shall become appurtenant to such lands and be and remain incident to the ownership of the above shares appurtenant to such lands. There shall be further incident to the ownership of such shares, the right to have such water delivered to the owner thereof by the association for the irrigation of said lands, as the association shall from time to time acquire or control means for that purpose: *Provided*, That the whole amount of water actually delivered to such lands from all sources shall not exceed the amount necessary for the proper cultivation thereof.

3. It is agreed and understood that the records of the association, as well as the certificate or other evidence of ownership of the shares of stock in the association, when issued, shall contain a description of the lands to be irrigated, as above described, and to which the aforesaid rights and shares shall be perpetually appurtenant; and all rights, whatever their source or whatever their manner of acquisition, to the use of water for the irrigation of said lands, shall hereafter be forever inseparably appurtenant thereto, together with the said shares of stock and all rights and interests represented thereby or existing or accruing by reason thereof, unless such rights shall become forfeited under the provisions of this contract, or of the by-laws of this associa-

tion, or by operation of law, or by the voluntary abandonment thereof by deed, grant, or other instrument, or by nonuser for the term prescribed by law; but no such abandonment shall be for the benefit of any person designated by the undersigned or his successor, directly or indirectly, or to his use, nor confer any right whatsoever upon the holder of any grant, release, waiver, or declaration of abandonment of any kind: *Provided, however,* That if for any reason it should at any time become impracticable to beneficially use water for the irrigation of the lands to which the right to the use of the water is appurtenant, the said right may be severed from said land and simultaneously transferred and attached to other lands to which shares of stock in this association are or shall thereby be made appurtenant, if a request for leave to transfer, showing the necessity therefor, shall have first been allowed by a two-thirds vote of the board of directors at a regular meeting and approved by the Secretary of the Interior.

4. Every transfer of the title to said lands to which the said rights and shares are appurtenant, whether by grant or operation of law (except where the land may be subjected by grant, or involuntarily under any law, to an easement, the exercise of which does not interfere with the cultivation of the soil by the servient owner), shall operate, whether it be so expressed therein or not, as a transfer to the grantee or successor in title of all rights to the use of water for the irrigation of said lands, also all rights arising from or incident to the ownership of such shares as well as the shares themselves, and upon presentation to this association of proof of any such transfer of land the proper officer shall transfer such shares of stock upon its books to the successor in title to said lands.

5. Any transfer or attempted transfer of any of the above shares of this association made or suffered by the owner thereof, unless simultaneously a transfer of the land to which they are appurtenant is made or suffered to or in favor of the same party, shall be of no force or effect for any purpose, and shall confer no rights of any kind whatsoever on the person or persons to whom such transfer may have been attempted to be made.

6. The undersigned or his transferee agrees to make prompt application to the proper authorities of the United States for a water right for the land represented by his shares, and duly proceed to the perfection thereof, in full compliance with the law applicable thereto and the rules and regulations established in pursuance thereof as soon as official announcement shall be made that water for such lands is available from the works constructed, owned, or controlled by the United States.

7. The undersigned shall, as prescribed in this contract, make application to the proper representative of the United States for a water right, at a rate not to exceed one acre for each share. Upon proper proof to the association that such application has been accepted and that he has complied with all the requirements in relation thereto, such subscriber shall be deemed to have paid on his stock the amount then paid to or for the use of the United States for such rights.

8. Calls and assessments shall be made and levied from time to time for the collection of the amounts due on the shares of the stock of the association, in pursuance of the requirements of the United States in connection with such water-right applications; and when all payments required for such rights shall have been made, and when proper evidence of the perfection of such water right has been issued, his stock shall be deemed and held to have been fully paid up, and until fully paid he shall be liable therefor; and the payments due thereon in pursuance of assessments and calls duly made by the association shall be a lien upon such lands and shares, and the said lien shall be enforced by the association by foreclosure and sale of said stock and lands or so much thereof as may be necessary, in the manner provided by law for the foreclosure of mortgages, and the purchaser at such sale shall be entitled to the benefit of all payments on the water right appurtenant to the land purchased, and shall take such land subject to the obligations and conditions herein provided; but nothing herein shall be construed as permitting any redemption of such stock and lands except as provided in the by-laws.

9. Assessments may be made from time to time as required for the operation, maintenance, repair, renewal, replacement, improvement, enlargement, or extension of the works owned, controlled or to be maintained by the association, and for the construction, acquisition, or control of any works, property, or rights required in connection with the business of the association and for the fulfillment of any obligation undertaken by it, or for the carrying out of any of its purposes.

10. It is understood and agreed that expenditures for purposes that are of benefit to a part only of the shareholders may be especially assessed against such shareholders in proportion to such benefits.

11. Assessments shall become from time to time, as they are made and levied, a lien on the said lands and shares of stock of the undersigned and his transferee, and all rights and interests represented by said shares, and until they are paid or otherwise discharged, shall be and remain a lien thereon. The manner of enforcing said lien shall be by foreclosure and sale of the stock and lands as herein provided for payments on capital stock.

12. It is expressly understood that business may be begun and that the subscriber shall be liable for any assessments or calls made or levied after.....[5] shares of the capital stock shall have been subscribed.

13. The undersigned furthermore grant to the association or to the United States, as the case may be, over the lands described herein, as may be required in connection with the works constructed or controlled by the association or by the United States for the use and benefit of the stockholders, necessary right of way for the construction, operation and maintenance of canals, tunnels and other water conduits, telephone and electric transmission lines, drains, dikes and other works for irrigation, drainage or reclamation.

14. It is further understood that no stockholder shall be entitled to more than 160 votes, and the benefit of any laws to the contrary is hereby expressly waived.

15. The undersigned furthermore agree to be bound by all the terms, conditions, limitations, and provisions contained in the articles of incorporation and by-laws of said ..... Water Users Association, including all amendments thereto now existing or which may hereafter be duly adopted.

In witness whereof, we have hereunto set our hands and seals, this .... day of ....., 190....

.....
.....
[Signature of Wife.]

Signed in the presence of—
.....
.....
Witnesses.

State of .....
County of .....,—*ss:*[6]

On this .... day of ....., in the year nineteen hundred and ..... before me, ..., a notary public in and for the said county, personally appeared ....., known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same; and on this .... day of ....., 190...., before me, the officer above described, personally appeared ....., known to me to be the person whose name is subscribed to the within instrument, described as a married woman, and upon an examination without the hearing of her husband I made her acquainted with the contents of the instrument, and thereupon she acknowledged to me that she executed the same, and that she does not wish to retract such execution.

[5] Insert number of shares which is known will be readily subscribed.

[6] Acknowledgment should be made in form prescribed by State or Territorial law, and must be sufficient to release any homestead exemptions, dower, or other rights.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[NOTARIAL SEAL.] ....,
My commission expires ..... *Notary Public.*

The above subscription and contract was accepted and approved by the ..... Water Users Association at a meeting of the board of directors held on the .... day of ....., 190....

..... WATER USERS ASSOCIATION,
By ....., *President.*

Attest:

....,
Secretary.[7]

And such stock subscription and contract shall become binding upon the association only when approved and executed by the association.

SEC. 4. Any shares of stock which may be forfeited under the provisions of the stock subscription and contract, as set forth in section 3 of Article I of the by-laws shall at once be canceled and shall not, under any circumstances, be renewed, revived, or reissued. Other stock in lieu thereof up to the limit of the total number of shares authorized by the articles of incorporation may be subscribed for and issued, subject to all the conditions of these by-laws, and the articles of incorporation and to the approval of the Secretary of the Interior.

SEC. 5. The ownership of each share of stock of this association shall carry as incident thereto a right to have water delivered to such shareholder by the association for the irrigation of the lands to which such share is appurtenant.

SEC. 6. The amount of water to be delivered to such owner during any irrigation season shall be that proportionate part of all the water available for distribution by the association during that season as the number of shares owned by him shall bear to the whole number of valid and subsisting shares then outstanding, such water to be delivered to and upon said lands at such times during that season as may be needed for the proper irrigation thereof.

SEC. 7. The records of the association, and each and every certificate or other evidence of ownership of the shares of stock in the association, when issued, shall contain a description of the lands to be irrigated, and to which the aforesaid rights and shares shall be perpetually appurtenant; and all rights to the use of water for the irrigation of said lands, whatever their source, or whatever their manner of acquisition, shall be forever inseparably appurtenant thereto, together with the said shares of stock, and all rights and interests represented thereby or existing or accruing by reason thereof, unless such rights shall become forfeited under the provisions of these by-laws, or by operation of law, or by the voluntary abandonment thereof by deed, grant, or other instrument, or by nonuser for the term prescribed by law; but no such abandonment shall be for the benefit of any person designated by such shareholder, directly or indirectly, or to his use, nor confer any right whatsoever upon the holder of any grant, release, waiver, or declaration of abandonment of any kind: *Provided, however,* That if for any reason it should at any time become impracticable to beneficially use water for the irrigation of the land to which the right to the use of the water is appurtenant, the said right may be severed from said land and simultaneously transferred and attached to other lands to which shares of stock in this association are or shall thereby be made appurtenant, if a request for leave to transfer, showing the necessity therefor, shall have first been allowed by a two-thirds vote of the board of directors at a regular meeting and approved by the Secretary of the Interior. All the provisions and agreements of this section shall be set forth in the aforesaid certificate

[7] The stock subscription should have printed on the back a form for notation by the proper county officer, showing place, date, and time of recording.

or other evidence of the ownership of shares of stock in the association, together with any other provisions and agreements made necessary by the articles of incorporation, or by-laws, and such certificate or other instrument shall be signed, executed, and acknowledged by the president and secretary of the association, and the board of directors shall pass by-laws prescribing the form of such certificate or other instrument, not inconsistent with the articles of incorporation or these by-laws.

SEC. 8. If it should be determined by the United States that the amount of water available from the entire irrigation system as owned or controlled by it and by the association shall be insufficient to properly irrigate one acre of land for each share of the capital stock, then no shares in excess thereof shall be issued, and the number of shares shall be so reduced, by appropriate amendment of the articles of incorporation, as not to exceed the number of acres determined by the United States as irrigable from the entire available supply of water.

SEC. 9. If, when such determination is made, the number of shares subscribed shall be in excess of the number of acres so determined, an allotment of shares shall be made to the subscribers equal to the number of acres irrigable, giving preference to cultivated land. The surplus of shares so subscribed shall thereupon be canceled and shall not be reissued. By-laws shall be adopted to govern such allotment.

SEC. 10. If the number of acres of irrigable land or the cost of the works, or both, as determined by the United States, shall exceed the number of shares of the capital stock authorized, appropriate amendment of the articles of incorporation as to the number of shares, the par value thereof, and the capital stock shall be made in compliance with the laws applicable thereto.

SEC. 11. Revenues necessary for the accomplishment of the purposes of this association shall be raised by call or assessment, from time to time as required, upon and against the shareholders.

SEC. 12. The board of directors shall have power to make and enforce necessary by-laws for fixing and enforcing the lien on the lands of the shareholders, and for the making, levying, collecting and enforcing of all assessments.

SEC. 13. Nothing in the articles of incorporation and by-laws or in the fact of becoming a member of this association shall be construed as affecting, or intended to affect or in any way interfere with the vested rights of any person to the prior use or delivery of any waters.

SEC. 14. The articles of incorporation or by-laws shall not be so amended as to in any wise conflict with any Federal statutes or the rules and regulations established thereunder for the administration of water from any reservoir or other works acquired, constructed, or controlled by the United States, and which may be used for supplying water to the lands of the shareholders of this association.

SEC. 15. No provision of any by-law embraced in Article I of these by-laws shall be amended or modified except with the approval of the Secretary of the Interior.

The remainder of the general by-laws and much other material concerning this subject has been printed by the Reclamation Service in a pamphlet entitled "Organization of Water Users Associations."

Many of the States affected by the Reclamation Act have passed laws for the purpose of facilitating the operations of the govern-

ment in carrying out the law. These statutes have covered several different points.

Several States and Territories have relieved these water users associations from the usual franchise taxes connected with incorporation, requiring instead a nominal fee. These are Colorado, Idaho, Montana, New Mexico, Oklahoma, Oregon and Washington.[8]

Montana, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota and Washington have provided that upon the filing of notice of intention of the United States to construct a project, with a statement of the amount of water to be used, such amount of water shall remain available for the use of the United States in connection with the project for a certain time, usually three years. Provision is made for confirmation of the right to use the water upon the filing of the evidence that construction has been authorized by the Secretary of the Interior.[9]

Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, and Washington have provided for the sale of State lands included within reclamation projects so as to conform to the provisions of the Reclamation Act.[10]

[8] *Colorado.*—Sess. Laws 1905, c. 141, sec. 1, p. 360.

Idaho.—Sess. Laws 1905, sec. 3, p. 374.

Montana.—Sess. Laws 1905, c. 66, p. 150.

New Mexico.—Sess. Laws 1905, c. 15, sec. 1, p. 43.

Oklahoma.—Sess. Laws 1905, c. 21, sec. 48, p. 296.

Oregon.—Sess. Laws 1907, c. 144, sec. 2, p. 287—act refers only to Umatilla River Water Users Association.

Washington.—Sess. Laws 1905, c. 88, sec. 7, p. 184.

[9] *Montana.*—Sess. Laws 1905, c. 44, sec. 1, p. 80.

New Mexico.—Sess. Laws 1907, c. 49, sec. 40.

North Dakota.—Sess. Laws 1905, c. 34, sec. 36, p. 54.

Oklahoma.—Sess. Laws 1905, c. 21, sec. 26, p. 287.

Oregon.—Sess. Laws 1905, c. 228, sec. 2, p. 401.

South Dakota.—Sess. Laws 1905, c. 132, sec. 36, p. 209, and Sess. Laws 1907, c. 180, sec. 37, p. 384.

Washington.—Sess. Laws 1905, c. 88, sec. 3, pp. 180 and 181.

[10] *Colorado.*—Sess. Laws 1905, c. 134, sec. 22.

Idaho.—Sess. Laws 1905, sec. 2, p. 374.

Montana.—Sess. Laws 1905, c. 53, sec. 1, p. 116.

Nevada.—Sess. Laws 1905, c. 64, sec. 2, p. 93.

New Mexico.—Sess. Laws 1907, c. 49, sec. 55.

North Dakota.—Sess. Laws 1905, c. 34, sec. 61, p. 59.

Oklahoma.—Sess. Laws 1905, c. 21, sec. 47, p. 295.

Oregon.—Sess. Laws, c. 228, sec. 11, p. 405.

South Dakota.—Sess. Laws, 1905, c. 132, sec. 58, p. 214.

Utah.—Sess. Laws 1905, c. 115, sec. 2, p. 177.

Washington.—Sess. Laws 1905, c. 88, sec. 6, p. 183.

One important matter which it was necessary to adjust by means of these articles of incorporation and by-laws was the disposition of lands held in private ownership in excess of one hundred and sixty acres.

The Reclamation Act provides in section 5 that "No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual *bona fide* resident on said land, or occupant thereof residing in the neighborhood of said land."

In the construction of these projects the United States expends large sums amounting in most cases to several million dollars, and it was essential that there should be no danger of this investment lying idle for a long period while awaiting the disposal of lands in small blocks by those who hold more than one hundred and sixty acres, or by those holding that amount or less who were unwilling to comply with the requirements of residence. There was also to be considered the tendency to hold as large blocks as possible for the great increase in values that was inevitable.

To meet this condition it became necessary to have an assurance that the lands would come into the hands of those who were qualified to apply for a water-right under the Reclamation Act as soon as the government was ready to furnish the water.

It was anticipated by all who had given the matter much thought that land values would increase materially as soon as the Secretary of the Interior had adopted a project and authorized construction; that these valuations would gradually increase as construction proceeded, and that there would be a very large addition to the values as the work approached completion.

These conditions have been realized even in greater measure than had been anticipated. In many cases lands have trebled in value, and the owners have benefited by a greatly increased demand due solely to the expenditures made by the government, and to the prospect of an early water supply in a region where previously the probabilities of an irrigation system seemed very remote because of the enormous expenditures required in order to secure a water supply.

It will be noted that prior to the passage of the Reclamation Act there had been great activity in the construction of irrigation systems, with the result that when the government entered the field

there were practically no projects which could be developed without extraordinary expenditures or the solution of difficult engineering problems. Accordingly the lands affected by most of these projects were those for which a possible irrigation system seemed very remote before the Federal statute became effective.

In order to secure prompt returns of the expenditures by the government the Secretary of the Interior required, in all cases where there was a considerable proportion of land in private ownership, that positive assurance should be given for the sale of tracts held in excess of one hundred and sixty acres. To meet this condition the water users associations adopted the plan of requiring the holders of excess lands to execute what is known as an excess holding contract. This is in effect a deed of trust transferring the title to the water users association in trust with power to sell the excess holdings in case the owner does not dispose of the land in small tracts to those who are qualified to file and do file water-right applications in conformity with the Reclamation Act.

Up to the present time it has not been necessary to enforce these contracts because the owners of the lands have been gradually disposing of the excess holdings, so that in the projects which have been completed up to the present time no difficulty along this line has thus far been encountered.

Before construction is begun by the government the water users association is required to enter into a contract with the Secretary of the Interior in the following form:

FORM OF CONTRACT BETWEEN ASSOCIATIONS OF WATER USERS AND THE SECRETARY OF THE INTERIOR.

These articles of agreement, made and entered into this .... day of ..... 19....., by and between the United States of America, acting in this behalf by ....., Secretary of the Interior, party of the first part, and the ..... Water Users Association, a corporation duly organized and existing under the laws of the ..... of ....., party of the second part, their successors and assigns, witnesseth:

That whereas the ..... Water Users Association is a corporation organized and existing under the laws of the ..... of ..... for the purposes mentioned in its articles of incorporation and by-laws, copies of which are appended to this agreement and are, for every purpose of the interpretation, construction, and consideration of this agreement and of the rights of the parties hereunder, to be deemed, held, read, and considered as if fully written out or printed herein, and deemed a part hereof; and

Whereas the lands embraced within the area proposed to be irrigated as described in said articles of incorporation or by-laws are naturally desert and arid and incapable of proper cultivation without irrigation, and will to a greater or less extent remain unreclaimed, unfit for habitation, and uncultivated, in which condition they, or a great part thereof, now are,

unless the waters of the ..... River in ..... and ..... tributaries be impounded and the flow thereof otherwise regulated and controlled; and

Whereas, the Secretary of the Interior contemplates the construction of certain irrigation works under the provisions of an act of Congress entitled "An act appropriating the receipts from the sale and disposal of public lands in certain States and territories to the construction of irrigation works for the reclamation of arid lands," approved June 17, 1902, for the irrigation and reclamation of the lands described in the said articles or by-laws; and

Whereas the incorporators and shareholders of said ..... Water Users Association are, and under the provisions of its articles of incorporation and by-laws must be, owners and occupants of lands in said area, and in some cases are appropriators of water for the irrigation thereof, and in addition thereto such incorporators and shareholders and their successors or assigns must initiate rights to the use of water from the said proposed irrigation works, to be constructed by the Secretary of the Interior as soon as such rights may be initiated, and thereafter complete the acquisition thereof in the manner and upon the terms and conditions to be prescribed therefor by the Secretary of the Interior, which rights shall be, and thereafter continue to be, forever appurtenant to designated lands owned by such shareholders; and

Whereas neither the relative priority nor the extent of the individual appropriations of such water heretofore made by said incorporators and shareholders for the lands described in said articles or by-laws, and which are now vested rights, have been ascertained or determined, but said incorporators and shareholders have agreed, among themselves, by the terms and provisions of said articles of incorporation and by-laws, upon the rules and principles by and upon which the relative priority and the extent of their several appropriations and vested rights to the use of such waters shall be determined:

Now, therefore, it is agreed and understood by and between the parties hereto—

1. That if the Secretary of the Interior shall authorize and cause the construction of said irrigation works, the said association will take prompt action to secure the determination by the courts of the relative rights of its shareholders to the use of the water for said lands, and that in the determination of such rights and of their respective rights to the use of water acquired under said act of Congress the rules and principles set out in said articles of incorporation and by-laws, for such determination, shall be deemed the established rules and principles for that purpose.

2. That only those who are or who may become members of said association, under the provisions of its articles of incorporation and by-laws, shall be accepted as applicants for rights to the use of water available by means of said proposed irrigation works.

3. That the aggregate amount of such rights to be issued shall, in no event, exceed the number of acres of land capable of irrigation by the total amount of water available for the purpose, being (1) the amount now appropriated by the shareholders of said association, and (2) the amount to be delivered from all sources in excess of the water now appropriated; and that the Secretary of the Interior shall determine the number of acres so capable of such irrigation as aforesaid, his determination to be made upon due and expert consideration of all available data, and to be based upon and measured and limited by the beneficial use of water.

4. That the payments for the water rights to be issued to the shareholders of said association, under the provisions of said act of Congress, shall be divided into not less than ..... annual payments, the first of which shall be payable when the water is first delivered from said works, or within a reasonable time thereafter, and after due notice thereof by

the Secretary of the Interior to the association, and that the cost of said proposed irrigation works shall be apportioned equally per acre among those acquiring such rights.

5. That the said Water Users Association hereby guarantees the payments for that part of the cost of the irrigation works which shall be apportioned by the Secretary of the Interior to its shareholders, and also for the cost of operation and maintenance as may be assessed from year to year by the Secretary of the Interior, and will promptly levy calls or assessments therefor and collect or require prompt payment thereof in such manner as the Secretary of the Interior may direct; that it will promptly pay the sums collected by it to the receiver of the local land office for the district in which said lands are situated; that it will promptly employ the means provided and authorized by the said articles of incorporation and by-laws for the enforcement of such collections, and will not change, alter, or amend its articles of incorporation or by-laws in any manner whereby such means of collection, or the lien given to it by the shareholders to secure the payment thereof, or of any assessments contemplated or authorized thereby, shall be impaired, diminished, or rendered less effective, without the consent of the Secretary of the Interior.

6. That the United States shall in no manner be responsible for the sums collected by said association until they have been paid into the hands of the receiver of the local land office, as provided by the law, and in accordance with such regulations as may be prescribed by the Secretary of the Interior.

7. That for the purpose of enforcing said collections, the association will adopt and enforce proper by-laws, subject to the approval of the Secretary of the Interior, and not change them so as to in anywise impair their efficiency for said purpose, and will otherwise do any and all things it is authorized and empowered to do in the premises.

8. That the association will adopt and enforce such rules and regulations as it is authorized by its articles of incorporation and by-laws to adopt and enforce, concerning the use of water by its shareholders and concerning the administration of the affairs of the association, to effectually carry out and promote the purposes of its organization within the provisions of said articles of incorporation and by-laws, which rules and regulations shall be subject to the approval of the Secretary of the Interior, and that if the association fail to make and adopt such rules and regulations, then the Secretary of the Interior may prescribe them; but in such event the Secretary of the Interior shall impose no rule or regulation interfering with any vested right of the shareholders of the association, as defined or modified by said articles of incorporation and by-laws.

9. That persons who are not now members of the association, but who may be the owners or occupants of land to be irrigated, as described in its articles of incorporation or by-laws, or of added lands as therein provided for and to whom rights to the use of water from the proposed irrigation works may be issued by the United States, may, at the designation of the Secretary of the Interior, become members of the association upon subscribing to the stock thereof and upon compliance with the other conditions prescribed for such membership.

10. That in all the relations between the United States and this association and the members of the association, the rights of the members of the association to the use of water where the same have vested, are to be defined, determined, and enjoyed in accordance with the provisions of the said act of Congress and of other acts of Congress on the subject of the acquisition and enjoyment of the rights to use water; and also by the laws of ....., where not inconsistent therewith, modified, if modified at all, by the provisions of the articles of incorporation and by-laws of said association.

11. That nothing contained in this agreement, or to be implied from the fact of its execution, shall be construed, held, or deemed to be an approval

by the Secretary of the Interior, nor an adoption by him of the articles of incorporation or by-laws of said association in all their details as the form of organization of water users contemplated and authorized by Section 6 of the said act of Congress of June 17, 1902; but such approval and adoption is expressly reserved until the conditions prescribed in said act authorizing such approval and adoption shall have arisen; and that when the Secretary of the Interior shall make, approve, and promulgate rules and regulations for the administration of the water to be supplied from said proposed irrigation works, such rules and regulations and such modifications thereof as the Secretary may, from time to time, approve and promulgate, shall be deemed and held to be obligatory upon this association as fully and completely, and to every intent and purpose as if they were now made, approved, promulgated, and written out in full in this agreement, and the same are to be so read and construed.

In witness whereof the undersigned have hereunto subscribed their names and affixed their seals the day and year first herein written.

[Departmental Seal.] ....., Secretary of the Interior, For and on behalf of the United States of America, Party of the First Part.

[Corporate Seal.] ....., *By* ....., Party of the Second Part.

Attest: ....., *Secretary.*

By this contract the association agrees to adjudicate the water-rights of its shareholders in accordance with the principles set out in the articles of incorporation and by-laws; guarantees the payment of the charges apportioned by the Secretary of the Interior against the lands of its stockholders; and agrees to adopt and enforce rules and regulations concerning the use of water by its shareholders which shall conform to the requirements of the government.

On the other hand, the government agrees to fix the irrigable acreage so that there shall be a sufficient water supply for each tract, and to recognize only those who are members of the association as qualified to apply for water-rights. The contract covers various other details of the relations between the association and the United States.

These associations have been able to facilitate the operations of the government in many directions. They have assisted in fixing the prices of lands which it was necessary for the government to purchase. In several cases they have acquired lands by condemnation when it seemed more practicable for the association to take this action than for the United States.[11]

But few questions regarding the water users associations in their relations to the United States have yet been passed upon by

[11] Lee v. Salt River Valley Water Users Assn. (Ariz.), 90 Pac. 1130.

the courts. In the case of Umatilla Water Users Assn. v. Irwin,[12] the relations of the association to the United States were commented upon in a general way, and the validity of its contract with the Secretary of the Interior was impliedly upheld by the supreme court of the State of Oregon. In Burley v. United States [13] the circuit court of appeals of the United States held that there was no valid objection to entering into such co-operative agreements with the owners of private land under reclamation projects.

These water users associations represent a rather novel means of co-operation in carrying out the legislative will, and their future proceedings will doubtless present for solution many interesting legal problems.

[12] 108 Pac. 1017.

[13] 179 Fed. 1–11.

PART VIII.
STATUTES.

(3d ed.)
§ 1428. DIGEST OF STATUTES.

The following digest of the statutes of the Western States upon waters is intended merely as a guide to the main features thereof, and as an indication of the recent character and extent of legislation. The statutes of the majority of the States are too voluminous to be given in detail, and only the most important features are noted. The latest law of Oregon is given in full, however, as are also the Federal and California statutes.

The laws of Wyoming are the basis of very much of the State legislation. They are the result of labors of Mr. Elwood Mead, formerly State Engineer of Wyoming, and later Chief of the Irrigation Investigation of the United States Department of Agriculture, and of Mr. Clarence T. Johnston, until recently Wyoming's State Engineer, and now Professor of Engineering in the University of Michigan. In 1903 an attempt was made to introduce in California, by what was known as the Works bill, an administrative code similar to the laws of Wyoming. The attempt was aided by Professor Mead, then occupying a chair in the University of California, who urged such a measure in a publication of the United States Department of Agriculture,[1] but the bill failed of passage because of the opposition of irrigators in Southern California. A similar bill failed in 1909, but a measure of this kind passed in 1911 for water-powers. In 1903, at the direct solicitation of commissions appointed by the governors of Oregon and Washington, a draft for a code was prepared by Mr. Morris Bien, of the legal department of the United States Reclamation Service. This code was partially adopted in Oregon, but failed of passage in Washington. Nevertheless it was substantially enacted in North Dakota, South Dakota and Oklahoma, in the statutes given below. The draft by Mr. Bien was based upon the codes already existing in Wyoming and other States. Oregon adopted a similar law in

[1] Bulletin 100.

1909. The writer understands that while legislation of this kind is favored by all engineers, whether of the Department of Agriculture or of the Reclamation Service of the Department of the Interior, yet the Department of Agriculture is most pleased with the part of it looking to the encouragement of private enterprises, while the Reclamation Service is most interested in that part which tends to "government ownership" of irrigation.

This legislation has been criticised as enforcing litigation on all water users to establish their rights, when but a small proportion of contests would arise if left alone, and because of the enforced expense. In a case where this objection was raised it was said: "Every person who appropriates water under the laws of this State must remember that it is sure to cost something for a final adjudication of such rights, and that they must pay the costs."[2] In the report of the Wyoming State Engineer for 1905–06 in practice the Wyoming system is said to work to general satisfaction. Only one arrest occurred in five years in water division number two in that State, and in two years no appeals were taken from the orders of the water officials. And the wide adoption of the "Water Code" administrative system shows that there was a demand for it.

The relation of the law of waters to practical irrigation is a matter of great importance. The writer has endeavored to state the law as it is. Many engineers in the field, however, believe that the law as it has been worked out by the slow and laborious process of court decision (spread through many books where it is not easily found, and taking shape considerably from the conservative attitude of the courts in their desire to protect vested rights—or, as Professor Mead expressed it:[3] "The slow evolution of a doctrine by piecemeal through court decision") does not adequately meet the requirements of the present energetic prosecution of irrigation works by many new methods. This attitude of the hydraulic engineers has led to the recent water code legislation.[4]

[2] Boise etc. Co. v. Stewart, 10 Idaho, 38, 77 Pac. 31.

[3] Bulletin 100, U. S. Dep. Agric., p. 49.

[4] Ex-President Roosevelt said: "The security and value of the homes created depend largely on the stability of titles to water, but the majority of these rest on the uncertain foundation of court decisions rendered in ordinary suits at law." (Cong. Rec., vol. 35, pp. 85, 86, Roosevelt's Message, 57th Cong., 1st Session.)

The judges say: "We cannot agree that the doctrine [a point in the law of appropriation] has resulted from ignorance concerning irrigation matters. Nor can we agree with the notion that men not necessarily or usually trained in the law are more

As above stated, a draft of a State Water Code was prepared by Mr. Bien, of the United States Reclamation Service. The writer requested Mr. Bien to present to the readers of this book a general view of the objects sought in the Water Code legislation, and in reply received the following letter, which the writer considers it a privilege to be able to include.

DEPARTMENT OF THE INTERIOR.

UNITED STATES GEOLOGICAL SURVEY.

RECLAMATION SERVICE.

Washington, D. C., November 1, 1905.

Mr. Samuel C. Wiel,

Dear Sir: I am in receipt of yours of October 21, 1905, requesting a statement of views concerning the recent irrigation legislation in the States and Territories of the West. My understanding is that you desire an expression concerning the relation of these enactments to the engineering side of irrigation.

In regard to the general features of this subject, the most important matter of interest to the engineer is that the adjudications of the courts upon the subject of water-rights should bear a closer relation to the physical conditions than was the case until within recent years, and even now there are frequent decisions which do not take fully into account the facts regarding water supply and the needs of the irrigators.

The principal advance in recent years in irrigation legislation has been a tendency to provide the supervision of persons technically qualified on the engineering side, in the appropriation, adjudication and distribution of water.

The earliest practice in the arid region permitted appropriators to put of record such claims to the water supply as they deemed advisable. The natural tendency was to make the claim large enough to cover all possible future development of their plans. This led in many instances to speculative claims and numerous cases are of record where each of a number of claims to the water

competent than the courts to determine the legal principles controlling the use of water by prior appropriation notwithstanding that the judges, as a rule, may not be practical irrigators." Potter, J., in Johnston v. Little Horse etc. Co., 13 Wyo. 208, 110 Am. St. Rep. 986, 79 Pac. 26, 70 L. R. A. 341.

of a stream filed in pursuance of the State statute involved a larger quantity of water than had ever flowed in it even in times of greatest flood.

When questions concerning such a stream came before the courts for adjustment the record would show claims to the use of water far in excess of any possible supply in connection with expert testimony (much of it was unreliable) as to the quantity of water available. In addition to this there would be much testimony on behalf of the parties to the proceeding tending to show the needs of crops as far in excess of the requirements of reasonable use.

As a result, the courts have decreed to the various claimants rights to the use of water which could by no possibility be obtained from the stream because the water was not there. These decrees have therefore left matters in but little better shape than they were before, and the parties have often been required to agree among themselves as to the partition of the water supply, following these decrees only in a general way, as an alternative to further expensive litigation.

In most of the recent legislation provision is made for a State Engineer who shall carefully examine all applications for water-rights and attempt to keep such applications within some reasonable relation to the amount of water available. He is required also from time to time to make hydrographic surveys, measuring the water supply in the streams and the amounts used for irrigation and other purposes. These investigations are used for the purpose of adjudicating the claims to water already of record and with resulting determination of the amount of unappropriated water available for further application.

In this way the States having legislation of this character propose to adjust accurately all claims of record and to regulate the filing of future claims.

The investigations of the State Engineer as to the water which is used are ultimately to form the basis of an adjustment of the rights of all parties by the courts. In some States there is an intermediate step providing for an adjustment by a State tribunal which is final in case there is no appeal to the judicial branch.

The water claimed under adjudication by the courts or under filings of record is distributed by State officers usually appointed by the State Engineer. The distribution is therefore, in a similar

way, under the supervision of persons technically qualified to measure the water supply who become thoroughly familiar with the rights of all parties in the districts under their charge and who are thus qualified to distribute the water to the best advantage, avoiding a condition which has often existed, of a waste in the use of water in one portion of a stream system and a corresponding shortage in another.

In addition to this, the legislation often provides a minimum duty of water, namely, that the unit of water supply shall be utilized for the irrigation of not less than a given number of acres. This legislative declaration of the duty of water would naturally be a guide to the courts in their adjudications and prevent the decree of excessive quantities of water, of which so many instances are of record.

The gratifying feature of nearly all recent legislation is the recognition of the logical underlying principles of the use of the waters in the Western States and Territories, a principle which is concisely stated in section 8 of the Act of Congress approved June 17, 1902 (32 Stat., 388), known as the Reclamation Act: "That the right to the use of water . . . . shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure and the limit of the right."

The idea that all rights to the use of water shall be founded upon beneficial use is of course as fully applicable to mining, power, manufacturing and all other beneficial purposes, as to irrigation.

The application of this principle to future legislation of the various States and Territories in which irrigation is practiced cannot fail to bring about a more satisfactory condition in this respect and eliminate from enterprises depending upon the use of water the doubts as to the legal status of water-rights and the great expense due to litigation resulting from these uncertainties.

The interest of the engineer in this legislation is of primary importance, as he finds it a great handicap in the designing of economical and efficient hydraulic structures when the amount of water which may be available for use therein is undetermined. The question in fact involves engineering considerations fully as much as, if not more than, those of a legal nature, and the outlook for future legislation is the more satisfactory because legislators have begun to recognize the hydraulic engineer as a neces-

sary factor in the appropriation, adjudication and distribution of rights to the use of water.

Very respectfully,

MORRIS BIEN,
SUPERVISING ENGINEER,
U. S. RECLAMATION SERVICE.[5]

[5] By way of suggestions, the State Engineers of six States met and formed the Association of State Engineers at Salt Lake City in May, 1904. The first regular meeting was held at Boise City, Idaho, in September, 1904. At this meeting resolutions were unanimously adopted recommending that rights should be limited to a definite volume per season rather than a definite flow for an indefinite period; that maps accompanying filings should be drawn from actual surveys; that water-rights should be appurtenant to the land irrigated and inseparable therefrom; except by some regular procedure; that the State Engineer should be the chief executive in water administration, and should have larger discretion in limiting the use by individuals, in approving or rejecting applications for appropriations, in extending time for filings and in appointing his subordinates.

A recent writer (Mill's Irrigation Manual) suggests the creation of a special judicial tribunal to handle water litigation, to be called a water-court; and the State Engineer of Colorado, Mr. Charles W. Comstock makes the same recommendation in his report for the year ending 1910.

(3d ed.)
§ 1429. FEDERAL STATUTES.

Constitution.
Act of 1866.
Desert Land Act.
Other assurances of local law.
Withdrawal Acts.
Right of Way and Reservoir Site Acts.
Water-power projects on navigable waters.
Carey Act.
National Irrigation Act.
Debris Act.
Irrigation investigation.
The public survey.
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Federal statutes construed.

Constitution.—*Article IV, sec. 3, subd. 2.*—"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

Amendment X.—"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Amendment V.—"No person shall be . . . . nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation." (This amendment applies only to acts of Congress.)

Amendment XIV. " . . . . Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Text, c. 5 et seq.

Act of 1866.—*Rev. Stats., sec. 2339.*—"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such

[Act of 1866]
vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage." (Sec. 9, A. C. July 26, 1866; 14 Stat. 253, c. 262; U. S. Comp. Stats. 1901, p. 1437.)

Rev. Stats., sec. 2340. "All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water-rights as may have been acquired under or recognized by the preceding section." (Sec. 17, A. C. July 9, 1870; 16 Stat. 218; U. S. Comp. Stats. 1901, p. 1437.)

Text, c. 128 et seq.
Desert Land Act.—*19 Stat. 377, 1 Supp. Rev. Stats. 137. Enacted March 3, 1877. Amended 1891 (26 Stat. 1095); amended A. C. June 27, 1906 (34 Stat. 520); amended March 26, 1908 (35 Stat. 48); amended March 28, 1908 (35 Stat. 52).*

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, that it shall be lawful for any citizen of the United States, or any person of requisite age 'who may be entitled to become a citizen, and who has filed his declaration to become such,' and upon payment of twenty-five cents per acre—to file a declaration under oath with the register and the receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same, within the period of three years thereafter, *provided, however, that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and*

[Desert Land Act]

use of the public for irrigation, mining and manufacturing purposes subject to existing rights. . . . . "

As originally enacted it applied to California, Oregon, Nevada, Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico. By Stat. March 3, 1891 (26 Stat. 1096, sec. 2), it was extended to Colorado. An act of June 17, 1910 (c. 298, p. 531, Sess. Laws 1909–10, 61st Cong., 2d Sess.) covers dry-farming enlarged homesteads in Idaho. See, also, A. C. February 19, 1909, c. 160, 35 Stat. 639, regarding dry-farming homesteads. Discovery of water subsequent to entry does not invalidate an entry made in good faith under the Dry-farming Act (38 Land Dec. 586).

Most of the act is upon a field outside of this book. Some further sections and amendments are printed in connection with the Reclamation Act below.

Text, § 176.

Other Assurances of Local Law.—In addition to the act of 1866 and the Desert Land Act of 1877, the following are the congressional assurances of local law referred to in section 176, *supra*, of the text:

The proviso in the act of March 3, 1891, is: "The privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States and Territories." Sec. 18 of the A. C. March 3, 1891, 26 Stat. 1095.

The Forest Service Administration Act of June 4, 1897 (30 Stat. 35) provides: "All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder."

An act of February 26, 1897 (29 Stat. 599, c. 335), provides: "The charges for water coming in whole or part from reservoir sites used or occupied under the provisions of this act shall always be subject to the control and regulation of the respective States and Territories in which such reservoirs are in whole or part situate."

The National Irrigation Act of June 17, 1902, sec. 8 (32 Stat. 390), provides: "Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof."

An act of February, 1905 (33 Stat. 628), provides that grants of rights of way for municipal or mining shall be "subject to the laws of the State or Territory in which said reserves are respectively situated."

An act of 1911, giving the Reclamation Service power to furnish water to Carey Act projects, provides: "That nothing in this act contained shall be held or construed as enlarging or attempting to enlarge the right of the United States, under existing law, to control the water of any stream in any State." A. C. Feb. 21, 1911 (Pub. No. 406).

In the extra session of Congress now sitting, H. R. 777 is a bill to grant the public lands to the respective States.

Withdrawal Acts.—The chief withdrawal act is that of June 25, 1910 (c. 421, p. 847, Session Laws of 1910, 61st Cong., 2d Session; approved June 25, 1910), entitled "An act to authorize the President of the United States to make withdrawals of public lands in certain cases." This act follows in full:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the President may at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an act of Congress.

"Sec. 2. That all lands withdrawn under the provisions of this act shall at all times be open to exploration, discovery, occupation, and purchase, under the mining laws of the United States, so far as the same apply to minerals other than coal, oil, gas, and phosphates: Provided, that the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a *bona fide* occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work: And provided further, that this act shall not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to the passage of this act: And provided further, that there shall be excepted from the force and effect of any withdrawal made under the provisions of this act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made: And provided further, that hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created within the limits of the States of Oregon,

[Withdrawal Acts]

Washington, Idaho, Montana, Colorado, or Wyoming, except by act of Congress.

"Sec. 3. That the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals."

Withdrawals for the Reclamation Service, and for Carey Act projects are provided for in the statutes covering those matters.

The following is the only instance in which Congress has legislated expressly to reserve waters from private acquisition. "That all entries under this act in the Black Hills Forest Reserve shall be subject to the quartz or lode mining laws of the United States, and the laws and regulations permitting the location, appropriation and use of the waters within the said forest reserves for mining, irrigation, and other purposes; *and no titles acquired by agricultural lands in said Black Hills Forest Reserve under this act shall vest in the patentee any riparian rights to any stream or streams of flowing water within said reserve; and that such limitation of title shall be expressed in the patents for the lands covered by such entries.*" *Act June 11, 1906, 34 Stat. L. 234.*

Text, c. 19.

Right of Way and Reservoir Site Acts.—*Local Law.*—The act of 1866, *supra*, confirms State and local law upon the subject of Rights of Way and Reservoir Sites.

Government Rights of Way Over Private Lands.—A proviso in the Sundry Civil Appropriation Act of Congress of August 30, 1890 (26 Stat. 391, c. 837; 6 Fed. Stats. Ann. 508; U. S. Comp. Stats. 1901, p. 1570), reads as follows: "That in all patents for lands hereafter taken up under any of the land laws of the United States, or on entries or claims validated by this act, west of the one hundredth meridian, it shall be expressed that there is reserved from the land in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States."

Irrigation.—A. C. March 3, 1891 (26 Stat. 1095, c. 561; 1 Supp. Rev. Stats. 942, 946). The act provides:

"Sec. 18. That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation, and duly organized under the laws of any State or Territory, which shall have filed or may hereafter file with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty

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feet on each side of the marginal limits thereof; also the right to take from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: Provided, that no such right of way shall be so located as to interfere with the proper occupation by the government of any such reservation, and all maps of location shall be subject to the approval of the department of the government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.

"Sec. 19. That any canal or ditch company desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way. Whenever any person or corporation, in the construction of any canal, ditch, or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

"Sec. 20. That the provisions of this act shall apply to all canals, ditches, or reservoirs heretofore or hereafter constructed, whether constructed by corporations, individuals, or association of individuals, on the filing of the certificates and maps herein provided for. If such ditch, canal, or reservoir has been or shall be constructed by an individual or association of individuals, it shall be sufficient for such individual or association of individuals to file with the Secretary of the Interior and with the register of the land office where said land is located a map of the line of such canal, ditch, or reservoir, as in case of a corporation, with the name of the individual owner or owners thereof, together with the articles of association, if any there be. Plats heretofore filed shall have the benefits of this act from the date of their filing, as though filed under it: Provided, that if any section of said canal

or ditch shall not be completed within five years after the location of said section the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture.

"Sec. 21. That nothing in this act shall authorize such canal or ditch company to occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance, and care of said canal or ditch."

Purposes Subsidiary to Irrigation.—The above act was supplemented May 11, 1898 (30 Stat. 404, sec. 2), providing: "Sec. 2. That rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty, and twenty-one of the act entitled, 'An act to repeal timber-culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature; and said rights of way may be used for purposes of water transported, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation."

Livestock Reservoirs.—A. C. January 13, 1897 (29 Stat. 484), entitled "An act providing for the location and purchase of public lands for reservoir sites," is as follows:

"That any person, livestock company, or transportation corporation engaged in breeding, grazing, driving or transporting livestock may construct reservoirs upon unoccupied public lands of the United States, not mineral or otherwise reserved, for the purpose of furnishing water to such livestock, and shall have control of such reservoir, under regulations prescribed by the Secretary of the Interior, and the lands upon which the same is constructed, not exceeding one hundred and sixty acres, so long as such reservoir is maintained and water kept therein for such purposes: Provided, that such reservoir shall not be fenced and shall be open to the free use of any person desiring to water animals of any kind.

"Sec. 2. That any person, livestock company, or corporation desiring to avail themselves of the provisions of this act shall file a declaratory statement in the United States land office in the district where the land is situated, which statement shall describe

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the land where such reservoir is to be or has been constructed; shall state what business such corporation is engaged in; specify the capacity of the reservoir in gallons, and whether such company, persons, or corporation has filed upon other reservoir sites within the same county; and if so, how many.

"Sec. 3. That at any time after the completion of such reservoir or reservoirs which, if not completed at the date of the passage of this act, shall be constructed and completed within two years after filing such declaratory statement, such person, company, or corporation shall have the same accurately surveyed, as hereinafter provided, and shall file in the United States land office, in the district in which such reservoir is located, a map or plat showing the location of such reservoir, which map or plat shall be transmitted by the register and receiver of said United States land office to the Secretary of the Interior and approved by him, and thereafter such land shall be reserved from sale by the Secretary of the Interior so long as such reservoir is kept in repair and water kept therein.

"Sec. 4. That Congress may at any time amend, alter, or repeal this act."

Right of Way Over Segregated Power Sites.—Approved February 26, 1897 (29 Stat. 599, c. 335). "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that all reservoir sites reserved or to be reserved shall be open to use and occupation under the Right of Way Act of March third, eighteen hundred and ninety-one. And any State is hereby authorized to improve and occupy such reservoir sites to the same extent as an individual or private corporation, under such rules or regulations as the Secretary of the Interior may prescribe: Provided, that the charges for water coming in whole or part from reservoir sites used or occupied under the provisions of this act shall always be subject to the control and regulation of the respective States and Territories in which such reservoirs are in whole or part situate."

Medicinal Springs.—The act of February 28, 1899 (30 Stat. 908), mentions specifically medicinal springs, as follows: "The Secretary of the Interior . . . . is hereby authorized, under such rules and regulations as he from time to time may make, to rent or lease to responsible persons or corporations applying therefor suit-

able spaces and portions of ground near, or adjacent to, mineral, medicinal, or other springs, within any forest reserves established within the United States, or hereafter to be established, and where the public is accustomed or desires to frequent, for health or pleasure, for the purpose of erecting upon such leased ground sanitariums or hotels, to be opened for the reception of the public. And he is further authorized to make such regulations, for the convenience of people visiting such springs, with reference to spaces and locations, for the erection of tents or temporary dwelling-houses to be erected or constructed for the use of those visiting such springs for health or pleasure. And the Secretary of the Interior is authorized to prescribe the terms and durations and the compensation to be paid for the privileges granted under the provisions of this act.

"Sec. 2. All funds arising from the privileges granted hereunder shall be covered into the Treasury of the United States as a special fund to be expended in the care of public forest reservations."

Permit Act of 1901.—The act of February 15, 1901 (31 Stat. 790), provides: "That the Secretary of the Interior be and he hereby is authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant national parks (791), California, for electrical plants, poles, and lines for the generation and distribution of *electrical power* and for *telephone* and *telegraph* purposes, and for canals, ditches, pipes and pipe-lines, flumes, tunnels, or other water conduits, and for water plants, dams and reservoirs used to promote *irrigation or mining or quarrying, or the manufacturing or cutting of timber and lumber, or the supplying of water for domestic, public, or any other beneficial uses* to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe-lines, electrical, telegraph and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use

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permitted hereunder or any one or more of the purposes herein named: Provided, that such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: Provided further, that all permits given hereunder for telegraph and telephone purposes shall be subject to the provisions of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: And provided further, that any permission given by the Secretary of the Interior under the provisions of this act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over, any public land, reservation, or park."

Compare A. C. May 11, 1898, 30 Stat. 404 (amending A. C. Jan. 21, 1895, 28 Stat. 635): "That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way upon the public lands of the United States, not within limits of any park, forest, military, or Indian reservations, for tramways, canals, or reservoirs, to the extent of the ground occupied by the water of the canals and reservoirs, and fifty feet on each side of the marginal limits thereof, or fifty feet on each side of the center line of the tramroad, by any citizen or association of citizens of the United States, for the purposes of furnishing water for domestic, public, and other beneficial uses."

Municipal and Mining Act of February 1, 1905 (33 Stat. 628). "Sec. 4. That rights of way for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals, within and across the forest reserves of the United States, are hereby granted to citizens and corporations of the United States for municipal or mining purposes, and for the purposes of the milling and reduction of ores, during the period of their beneficial use, under such rules and regulations as may be prescribed by the Secretary of the Interior, and subject to the laws of the State or Territory in which said reserves are respectively situated."

Electric Power Act of March 4, 1911.—"That the head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights of way, for a period

not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands, national forests, and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for telephone and telegraph purposes, to the extent of twenty feet on each side of the center line of such electrical telephone and telegraph lines and poles, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right of way herein granted for any one or more of the purposes herein named; *provided,* that such right of way shall be allowed within or through any national park, national forest, military, Indian or any other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest: *provided,* that all or any part of such right of way may be forfeited and annulled by declaration of the head of the department having jurisdiction over the lands for nonuse for a period of two years or for abandonment.

"That any citizen, association, or corporation of the United States to whom there has heretofore been issued a permit for any of the purposes specified herein under any existing law, may obtain the benefit of this act upon the same terms and conditions as shall be required of citizens, associations, or corporations hereafter making application under the provisions of this statute." (Contained in the Agricultural Appropriation Bill of March 4, 1911, — Stat. ——.)

This was a Senate Amendment to the House Bill. In reporting it to the Senate from conference, Senator Smoot said: "That amendment was agreed to by the House conferees with an amendment striking out the term 'the Secretary of Agriculture' and inserting the words 'the head of the department having jurisdiction over said lands' wherever that term may appear. I may say in reference to this amendment that it is identical in its terms, with the exception of the amendment which I have just stated, with a bill which has already passed the Senate and which is upon the calendar of the House with a favorable report from the Committee on the Public Lands. It is practically identical with a provision which was reported in this bill a year or two ago from the Committee on Agriculture, but which went out on a point of order. It has the approval of the Secretary of the Interior and the Secretary of Agriculture, and I may say that it changes existing law only to this extent, that it provides that a permit may be issued for rights of way for the purposes specified for a fixed term of fifty years, whereas the present law requires all such permits to be revocable at the will of the authority granting them." (46 Cong. Rec. 4140, March 2, 1911.)

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Rules, Regulations and Procedure Under These Acts.—The Forest Service publishes its requirements in the "Use Book." The Interior Department has also issued a statement of requirements. See 34 Land Dec. 212, and circulars issued at various times, to be had upon request.

Text, § 431 et seq.

Miscellaneous Right of Way Enactments.

Railways.—A. C. March 3, 1875, c. 152; 18 Stat. 482; U. S. Comp. Stats. 1901, p. 1568. (See, also, c. 204, p. 349, Sess. Laws 1909–10, 61st Cong., 2d Sess., granting lands to railways for reservoirs on Indian allotments.)

Oil Pipe-lines in Colorado and Wyoming.—A. C. May 21, 1896 (29 Stat. 197). See, also, A. C. April 12, 1910 (p. 296, Sess. Laws 1909–10, 61st Cong., 2d Sess.), granting rights of way for oil or gas pipe-lines in Arkansas.

Edison Electric Co.—Permits to issue under regulation of the Secretary of the Interior, in certain California forest reserves. A. C. May 1, 1906 (34 Stat. 163).

Amendments in Extra Session of 1911.—Some amendments are pending at this writing, in the extra session of Congress of 1911; for example, H. R. 751 (Weeks Bill) concerning rights of way over public lands; H. R. 8778 (Mondell Bill), concerning rights of way in forest reserves, etc.; Senate 1585 (Gronna Bill) concerning water-power.

Grants of Rights of Way by Settlers Before Patent.—"Any *bona fide* settler under the pre-emption, homestead, or other settlement law shall have the right to transfer, by warranty against his own acts, any portion of his claim for church, cemetery, or school purposes, or for the right of way of railroads, canals, reservoirs or ditches for irrigation or drainage across it; and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to his claim." Rev. Stats. (U. S.), sec. 2288, as amended by the act of 1891 (Act March 3, 1891, c. 561; 26 Stat. 1097; U. S. Comp. Stats. 1901, p. 1385).

Water-power Projects on Navigable Waters. (Dam Act of June 23, 1910, c. 360, p. 593; 2d Sess., 61st Cong.; amending A. C. June 21, 1906, 34 Stat. 386.)

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act entitled 'An Act to regulate the construction of dams across navigable waters,' approved June twenty-first, nineteen hundred and six, be, and the same is hereby, amended to read as follows:

" 'Section 1. That when authority has been or may hereafter be granted by Congress, either directly or indirectly or by any official or officials of the United States, to any persons, to construct and maintain a dam, for water-power or other purpose across or in any of the navigable waters of the United States, such dam shall not be built or commenced until the plans and specifications for such dam and all accessory works, together with such drawings of the proposed construction and such map of the proposed location as may be required for a full understanding of the subject, have been submitted to the Secretary of War and the Chief of Engineers for their approval, nor until they shall have approved such plans and specifications and the location of such dam and accessory works; and when the plans and specifications for any dam to be constructed under the provisions of this

act have been approved by the Chief of Engineers and by the Secretary of War it shall not be lawful to deviate from such plans or specifications either before or after completion of the structure unless the modification of such plans or specifications has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War: Provided, That in approving the plans, specifications, and location of any dam, such conditions and stipulations may be imposed as the Chief of Engineers and the Secretary of War may deem necessary to protect the present and future interests of the United States, which may include the condition that the persons constructing or maintaining such dam shall construct, maintain, and operate without expense to the United States, in connection with any dam and accessory or appurtenant works, a lock or locks, booms, sluices, or any other structure or structures which the Secretary of War and the Chief of Engineers or Congress at any time may deem necessary in the interests of navigation, in accordance with such plans as they may approve, and also that whenever Congress shall authorize the construction of a lock or other structures for navigation purposes in connection with such dam, the persons owning such dam shall convey to the United States, free of cost, title to such land as may be required for such construction and approaches, and shall grant to the United States free water power or power generated from water power for building and operating such constructions: Provided further, That in acting upon said plans as aforesaid the Chief of Engineers and the Secretary of War shall consider the bearing of said structure upon a comprehensive plan for the improvement of the waterway over which it is to be constructed with a view to the promotion of its navigable quality and for the full development of water-power; and, as a part of the conditions and stipulations imposed upon them, shall provide for improving and developing navigation, and fix such charge or charges for the privilege granted as may be sufficient to restore conditions with respect to navigability as existing at the time such privilege be granted or reimburse the United States for doing the same, and for such additional or further expense as may be incurred by the United States with reference to such project, including the cost of any investigations necessary for approval of plans and of such supervision of construction as may be necessary in the interests of the United States: Provided further, That the Chief of Engineers and the Secretary of War are hereby authorized and directed to fix and collect just and proper charge or charges for the privilege granted to all dams authorized and constructed under the provisions of this act which shall receive any direct benefit from the construction, operation and maintenance by the United States of storage reservoirs at the headwaters of any navigable streams or from the acquisition, holding, and maintenance of any forested watershed, or lands located by the United States at the headwaters of any navigable stream wherever such shall be, for the development, improvement, or preservation of navigation in such streams in which such dams may be constructed.

"'Sec. 2. That the right is hereby reserved to the United States to construct, mantain, and operate, in connection with any dam built in accordance with the provisions of this act, a suitable lock or locks, booms, sluices, or any other structures for navigation purposes, and at all times to control the said dam and the level of the pool caused by said dam to such an extent as may be necesary to provide proper facilities for navigation.

"'Sec. 3. That the persons constructing, maintaining, or operating any dam or appurtenant or accessory works, in accordance with the provisions of this act, shall be liable for any damage that may be inflicted thereby upon private property, either by overflow or otherwise. The persons owning or operating any such dam, or accessory works, subject to the provisions of this act, shall maintain, at their own expense, such lights and

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other signals thereon and such fishways as the Secretary of Commerce and Labor shall prescribe, and for failure so to do in any respect shall be deemed guilty of a misdemeanor and subject to a fine of not less than five hundred dollars, and each month of such failure shall constitute a separate offense and subject such persons to additional penalties therefor.

" 'Sec. 4. That all rights acquired under this act shall cease and be determined if the person, company, or corporation acquiring such rights shall, at any time, fail, after receiving reasonable notice thereof, to comply with any of the provisions and requirements of the act, or with any of the stipulations and conditions that may be prescribed as aforesaid by the Chief of Engineers and the Secretary of War, including the payment into the Treasury of the United States of the charges provided for by section one of this act: Provided, That Congress may revoke any rights conferred in pursuance of this act whenever it is necessary for public use, and, in the event of any such revocation by Congress, the United States shall pay the owners of any dam and appurtenant works built under authority of this act, as full compensation, the reasonable value thereof, exclusive of the value of the authority or franchise granted, such reasonable value to be determined by mutual agreement between the Secretary of War and the said owners, and in case they cannot agree, then by proceedings instituted in the United States Circuit Court for the condemnation of such properties: And provided also, That the authority granted under or in pursuance of the provisions of this act shall terminate at the end of a period not to exceed fifty years from the date of the original approval of the project under this act, unless sooner revoked as herein provided or Congress shall otherwise direct: Provided, however, That this limitation shall not apply to any corporation or individual heretofore authorized by the United States, or by any State, to construct a dam in or across a navigable waterway, upon which dam expenditures of money have heretofore been made in reliance upon such grant or grants.

" 'Sec. 5. That any persons who fail or refuse to comply with the lawful order of the Secretary of War and the Chief of Engineers, made in accordance with the provisions of this act, shall be deemed guilty of a violation of this act, and any persons who shall be guilty of a violation of this act shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, and every month such persons shall remain in default shall be deemed a new offense and subject such persons to additional penalties therefor; and in addition to the penalties above described the Secretary of War and the Chief of Engineers may, upon refusal of the persons owning or controlling any such dam and accessory works to comply with any lawful order issued by the Secretary of War or Chief of Engineers in regard thereto, cause the removal of such dam and accessory works as an obstruction to navigation at the expense of the persons owning or controlling such dam, and suit for such expenses may be brought in the name of the United States against such persons and recovery had for such expense in any court of competent jurisdiction. Said provision as to recovery of expenses shall not apply wherever the United States has been previously reimbursed for such removal; and the removal or any structures erected or maintained in violation of the provisions of this act or the order or direction of the Secretary of War or the Chief of Engineers made in pursuance thereof may be enforced by injunction, *mandamus*, or other summary process, upon application to the Circuit Court in the district in which such structure may, in whole or in part, exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States at the request of the Chief of Engineers or the Secretary of War; and in case of any litigation arising from any obstruction or alleged obstruction to naviga-

tion created by the construction of any dam under this act the cause or question arising may be tried before the Circuit Court of the United States in any district in which any portion of said obstruction or dam touches.

"'Sec. 6. That whenever Congress shall hereafter by law authorize the construction of any dam across any of the navigable waters of the United States, and no time for the commencement and completion of such dam is named in said act, the authority thereby granted shall cease and be null and void unless the actual construction of the dam authorized in such act to be commenced within one year and completed within three years from the date of the passage of such act.

"'Sec. 7. That the right to alter, amend, or repeal this act is hereby expressly reserved as to any and all dams which may be constructed in accordance with the provisions of this act, and the United States shall incur no liability for the alteration, amendment, or repeal thereof to the owner or owners or any other persons interested in any dam which shall have been constructed in accordance with its provisions.

"'Sec. 8. That the word "persons" as used in this act shall be construed to import both the singular and the plural, as the case demands, and shall include corporations, companies, and associations. The word "dam" as used in this act shall be construed to import both the singular and the plural, as the case demands.'"

Text, c. 59.

The Carey Act.—28 Stat. 372–427, c. 301; 2 Supp. Rev. Stats. 259 (1894); amended June 11, 1896 (29 Stat. 434; 2 Supp. Rev. Stats. 52); 31 Stat. 1138–1188, and subsequent amendments below noted.

The act is as follows: "(Sec. 4.) That to aid the public land States in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers, the Secretary of the Interior, with the approval of the President, be, and hereby is, authorized and empowered, upon proper application of the State to contract and agree, from time to time, with each of the States in which there may be situated desert lands as defined by the act entitled 'An act to provide for the sale of desert land in certain States and Territories,' approved March third, eighteen hundred and seventy-seven, and the act amendatory thereof, approved March third, eighteen hundred and ninety-one, binding the United States to donate, grant and patent to the State free of cost for survey or price such desert lands, not exceeding one million acres in each State, as the State may cause to be irrigated, reclaimed, occupied, and not less than twenty acres of each one hundred and sixty acre tract cultivated by actual settlers, within ten years next after the passage of this act, as thoroughly as is required of citizens who may enter under the said desert land law.

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"Before the application of any State is allowed or any contract or agreement is executed or any segregation of any of the land from the public domain is ordered by the Secretary of the Interior, the State shall file a map of the said land proposed to be irrigated which shall exhibit a plan showing the mode of the contemplated irrigation and which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation, and the Secretary of the Interior may take necessary regulations for the reservation of the lands applied for by the States to date from the date of the filing of the map and plan of irrigation, but such reservation shall be of no force whatever if such map and plan of irrigation shall not be approved. That any State contracting under this section is hereby authorized to make all necessary contracts to cause the said lands to be reclaimed, and to induce their settlement and cultivation in accordance with and subject to the provisions of this section; but the State shall not be authorized to lease any of said lands or to use or dispose of the same in any way whatever, except to secure their reclamation, cultivation and settlement.

"As fast as any State may furnish satisfactory proof according to such rules and regulations as may be prescribed by the Secretary of the Interior, that any of said lands are irrigated, reclaimed and occupied by actual settlers, patents shall be issued to the State or its assigns for said lands so reclaimed and settled: Provided, that said States shall not sell or dispose of more than one hundred and sixty acres of said lands to any one person, and any surplus of money derived by any State from the sale of said lands in excess of the cost of their reclamation, shall be held as a trust fund for and be applied to the reclamation of other desert lands in such States. That to enable the Secretary of the Interior to examine any of the lands that may be selected under the provisions of this section, there is hereby appropriated out of any moneys in the treasury, not otherwise appropriated, one thousand dollars."

Amended July 11, 1896 (29 Stat. 434): "That under any law heretofore or hereafter enacted by any State, providing for the reclamation of arid lands, in pursuance and acceptance of the terms of the grant made in section four of an act entitled, 'An act making appropriations for the sundry civil expenses of the

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government for the fiscal year ending June thirtieth, eighteen hundred and ninety-five,' approved August eighteenth, eighteen hundred and ninety-four, a lien or liens is hereby authorized to be created by the State to which such lands are granted and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of land reclaimed, for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers, and when an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract or tracts of such lands, then patents shall issue for the same to such State without regard to settlement or cultivation: Provided, that in no event, in no contingency and under no circumstances shall the United States be in any manner directly or indirectly liable for any amount of any such lien or liability, in whole or in part."

Amended March 3, 1901 (31 Stat. 1138–1188): "The ten years' period within which any State shall cause the lands applied for under said act to be irrigated and reclaimed as provided for in said act as amended by the act of June 11th, 1896, shall be begun to run from the date of approval by the Secretary of the Interior of the State's application for the segregation of such lands; and if the State fails within said ten years to cause the whole or any part of the land so segregated to be irrigated and reclaimed, the Secretary of the Interior may, in his discretion, continue said segregation for a period of not exceeding five years, or may, in his discretion, restore such lands to the public domain."

Amended March 15, 1910 (Sess. Laws 1910, c. 96, p. 237, 61st Cong., 2d Sess., being Public No. 87, H. R. 21,428), entitled "An act authorizing the Secretary of the Interior to make temporary withdrawals of public lands for certain purposes," provides: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that to aid in carrying out the purposes of section four of the act of August eighteenth, eighteen hundred and ninety-four, entitled 'An act making appropriations for sundry civil expenses of the government for the fiscal year ending eighteen hundred and ninety-five, and for other purposes,' it shall be lawful for the Secretary of the Interior, upon application by the proper officer of any State

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or Territory to which said section applies, to withdraw temporarily from settlement or entry areas embracing lands for which the State or Territory proposes to make application under said section, pending the investigation and survey preliminary to the filing of the maps and plats and application for segregation by the State or Territory: Provided, that if the State or Territory shall not present its application for segregation and maps and plats within one year after such temporary withdrawal the lands so withdrawn shall be restored to entry as though such withdrawal had not been made." (For regulations under this amendment, see 38 Land Dec. 580.)

See, also, A. C. February 18, 1909 (c. 150, 35 Stat. 638), extending the Carey Act to New Mexico and Arizona; A. C. 1910 (c. 140 p. 288, sec. 27, Sess. Laws 1909–10, 61st Cong., 2d Sess.), extending the Carey Act to the Shoshone or Wind River Indian Reservation in Wyoming outside of forest reserves; Sess. Laws 1909–10 (61st Cong., 2d Sess., p. 285), extending to Wintah Reservation in Utah; *Ibid.*, p. 583, permitting selection of coal lands, reserving mining rights.

Text, cc. 60–63.

National Irrigation Act.—32 Stats. at Large, 388; approved June 17, 1902. In Stats. 1904–05, page 706, this act is referred to as "the National Irrigation Law." In same, page 1032, it is referred to as "known as the Reclamation Act." The act follows in full:

"An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:*

"Section 1. That all moneys received from the sale and disposal of public lands in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming beginning with the fiscal year ending June 30, 1901, including the surplus of fees and commissions in excess of allowances to registers and receivers, and excepting the five per centum of the proceeds of the sales of public lands in the above States set aside by law for educational and other purposes, shall be, and the same are hereby, reserved, set aside, and appropriated as a special fund in the treasury to be known as the 'reclamation fund,' to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semi-arid lands in the said States and Territories, and for the payment of all other expenditures provided for in this act: Provided, that in case the receipts from the sale and disposal of public lands other than those realized from the sale and disposal of lands referred to in this section are insufficient to meet the requirements for the support of agricultural colleges, in the several States and Territories, under the act of August 30, 1890, 'An act to apply

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a portion of the proceeds of the public lands to the more complete endowment and support of the colleges for the benefit of agriculture and the mechanic arts, established under the provisions of an act of Congress approved July 2, 1860,' the deficiency, if any, in the sum necessary for the support of the said college shall be provided for from any moneys in the treasury not otherwise appropriated.

"Sec. 2. That the Secretary of the Interior is hereby authorized and directed to make examinations and surveys for, and to locate and construct, as herein provided, irrigation works for the storage, diversion, and development of waters, including artesian wells, and to report to Congress at the beginning of each regular session as to the results of such examinations and surveys, giving estimates of cost of all contemplated works, the quantity and location of the lands which can be irrigated therefrom, and all facts relative to the practicability of each irrigation project; also the costs of works in process of construction as well as of those which have been completed.

"Sec. 3. That the Secretary of the Interior shall, before giving the public notice provided for in section 4 of this act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this act; and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: Provided, that all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this act; that said surveys shall be prosecuted diligently to completion, and upon the completion thereof, and of the necessary maps, plans and estimates of cost, the Secretary of the Interior shall determine whether or not said project is practicable and advisable, and if determined to be impracticable and unadvisable, he shall thereupon restore said lands to entry; that public lands which it is proposed to irrigate by means of any contemplated works shall be subject to entry only under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms and conditions herein provided: Provided, that the commutation provisions of the homestead laws shall not apply to entries made under this act.

"Sec. 4. That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: Provided, that in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be employed thereon.

"Sec. 5. That the entryman upon lands to be irrigated by such works shall, in addition to compliance with

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the homestead laws reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patents for the lands covered by his entry shall pay to the government the charges apportioned against such tract, as provided in section 4. No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual *bona fide* resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made. The annual installments shall be paid to the receiver of the local land office of the district in which the land is situated, and failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture of all rights under this act, as well as any moneys already paid thereon. All moneys received from the above sources shall be paid into the reclamation fund. Registers and receivers shall be allowed the usual commissions on all moneys paid for lands entered under this act.

"Sec. 6. That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this act: Provided, that when the payments required by this act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: Provided, that the title to, and the management and operation of, the reservoirs and the works necessary for their protection and operation shall remain in the government until otherwise provided by Congress.

"Sec. 7. That where, in carrying out the provisions of this act, it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney General of the United States upon every application of the Secretary of the Interior, under this act, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice.

"Sec. 8. That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in the irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: provided, that the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right.

"Sec. 9. That it is hereby declared to be the duty of the Secretary of the Interior in carrying out the provisions of this act so far as the same may be practicable and subject to the existence of feasible irrigation projects, to expend the major portion of the funds arising from the sale of public lands within each State and Territory hereinbefore named for the benefit of arid and semi-arid lands within the limits of such State or Territory; provided, that the secretary may temporarily use such portion of said funds for the benefit of arid or semi-arid lands in any particular State or Territory hereinbefore named as he

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may deem advisable, but when so used the excess shall be restored to the fund as soon as practicable, to the end that ultimately, and in any event, within each ten-year period after the passage of this act, the expenditures for the benefit of the said States and Territories shall be equalized according to the proportions and subject to the conditions as to practicability and feasibility aforesaid.

"Sec. 10. That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act into full force and effect."

An act authorizing the use of earth, stone, and timber on the public lands and forest reserves of the United States in the construction of works under the national irrigation law.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that in carrying out the provisions of the national irrigation law, approved June seventeenth, nineteen hundred and two, and in constructing works thereunder, the Secretary of the Interior is hereby authorized to use and to permit the use by those engaged in the construction of works under said law, under rules and regulations to be prescribed by him, such earth, stone, and timber from the public lands of the United States as may be required in the construction of such works, and the Secretary of Agriculture is hereby authorized to permit the use of earth, stone, and timber from the forest reserves of the United States for the same purpose, under rules and regulations to be prescribed by him." Approved February 8, 1905 (33 Stat. 706).

An act to provide for the covering into the reclamation fund certain proceeds of sales of property purchased by the reclamation fund.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that there shall be covered into the reclamation fund established under the act of June seventeenth, nineteen hundred and two, known as the Reclamation Act, the proceeds of the sales of material utilized for temporary work and structures in connection with the operations under the said act, as well as of the sales of all other condemned property which had been purchased under the provisions thereof, and also any moneys refunded in connection with the operations under said Reclamation Act." Approved March 3, 1905 (33 Stats. 1032).

An act providing for the withdrawal from public entry of lands needed for townsite purposes in connection with irrigation projects under the Reclamation Act of June seventeenth, nineteen hundred and two, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Secretary of the Interior may withdraw from public entry any lands needed for townsite purposes in connection with irrigation projects under the Reclamation Act of June seventeenth, nineteen hundred and two, not exceeding one hundred and sixty acres in each case, and survey and subdivide the same into town lots, with appropriate reservations for public purposes.

"Sec. 2. That the lots so surveyed shall be appraised under the direction of the Secretary of the Interior and sold under his direction at not less than their appraised value at public auction to the highest bidders, from time to time, for cash, and the lots offered for sale and not disposed of may afterward be sold at not less than the appraised value under such regulations as the Secretary of the Interior may prescribe. Reclamation funds may be used to defray the necessary expenses of appraisement

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and sale, and the proceeds of such sales shall be covered into the reclamation fund.

"Sec. 3. That the public reservations in such townsites shall be improved and maintained by the town authorities at the expense of the town; and upon the organization thereof as municipal corporations the said reservations shall be conveyed to such corporations by the Secretary of the Interior, subject to the condition that they will be used forever for public purposes.

"Sec. 4. That the Secretary of the Interior shall, in accordance with the provisions of the Reclamation Act, provide for water-rights in amount he may deem necessary for the towns established as herein provided, and may enter into contract with the proper authorities of such towns, and other towns or cities on or in the immediate vicinity of irrigation projects, which shall have a water-right from the same source as that of said project for the delivery of such water supply to some convenient point, and for the payment into the reclamation fund of charges for the same to be paid by such towns or cities, which charges shall not be less nor upon terms more favorable than those fixed by the Secretary of the Interior for the irrigation project from which the water is taken.

"Sec. 5. That whenever a development of power is necessary for the irrigation of lands under any project undertaken under the said Reclamation Act, or an opportunity is afforded for the development of power under any such project, the Secretary of the Interior is authorized to lease for a period not exceeding ten years, giving preference to municipal purposes, any surplus power or power privilege, and the money derived from such leases shall be covered into the reclamation fund and be placed to the credit of the project from which such power is derived: Provided, that no lease shall be made of such surplus power or power privilege as will impair the efficiency of the irrigation project." Approved April 16, 1906 (34 Stat. 116).

An act to extend the Irrigation Act to the State of Texas.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the provisions of the act entitled 'An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands,' approved June seventeenth, nineteen hundred and two, be, and the same are hereby, extended so as to include and apply to the State of Texas." Approved June 12, 1906 (34 Stat. 259).

An act providing for the subdivision of lands under the Reclamation Act, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that whenever, in the opinion of the Secretary of the Interior, by reason of market conditions and the special fitness of the soil and climate for the growth of fruit and garden produce, a lesser area than forty acres may be sufficient for the support of a family on lands to be irrigated under the provisions of the act of June seventeenth, nineteen hundred and two, known as the Reclamation Act, he may fix a lesser area than forty acres as the minimum entry and may establish farm units of not less than ten nor more than one hundred and sixty acres. That whenever it may be necessary, for the purpose of accurate description, to further subdivide lands to be irrigated under the provisions of said Reclamation Act, the Secretary of the Interior may cause subdivision surveys to be made by the officers of the Reclamation Service, which subdivisions shall be rectangular in form, except in cases where irregular subdivisions may be necessary in order to provide for practicable and economical irrigation. Such subdivision surveys shall be noted upon the tract

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books in the General Land Office, and they shall be paid for from the reclamation fund: Provided, that an entryman may elect to enter under said Reclamation Act a lesser area than the minimum limit in any State or Territory.

"Sec. 2. That wherever the Secretary of the Interior in carrying out the provisions of the Reclamation Act, shall acquire by relinquishment lands covered by a *bona fide* unperfected entry under the land laws of the United States, the entryman upon such tract may make another and additional entry, as though the entry thus relinquished had not been made.

"Sec. 3. That any townsite heretofore set apart or established by proclamation of the president, under the provisions of sections twenty-three hundred and eighty and twenty-three hundred and eighty-one of the Revised Statutes of the United States, within or in the vicinity of any reclamation project, may be appraised and disposed of in accordance with the provisions of the act of Congress approved April sixteenth, nineteen hundred and six, entitled 'An act providing for the withdrawal from public entry of lands needed for townsite purposes in connection with irrigation projects under the Reclamation Act of June seventeenth, nineteen hundred and two, and for other purposes'; and all necessary expenses incurred in the appraisal and sale of lands embraced within any such townsite shall be paid from the reclamation fund, and the proceeds of the sales of such lands shall be covered into the reclamation fund.

. . . . . .

"Sec. 5. That where any *bona fide* desert land entry has been or may be embraced within the exterior limits of any land withdrawal or irrigation project under the act entitled 'An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands,' approved June seventeenth, nineteen hundred and two, and the desert land entryman has been or may be directly or indirectly hindered, delayed, or prevented from making improvements or from reclaiming the land embraced in any such entry by reason of such land withdrawal or irrigation project, the time during which the desert land entryman has been or may be so hindered, delayed, or prevented from complying with the desert land law shall not be computed in determining the time within which such entryman has been or may be required to make improvements or reclaim the land embraced within any such desert land entry: Provided, that if after investigation the irrigation project has been or may be abandoned by the government, time for compliance with the desert land law by any such entryman shall begin to run from the date of notice of such abandonment of the project and the restoration to the public domain of the lands withdrawn in connection therewith, and credit shall be allowed for all expenditures and improvements heretofore made on any such desert land entry of which proof has been filed; but if the reclamation project is carried to completion so as to make available a water supply for the land embraced in any such desert land entry, the entryman shall thereupon comply with all the provisions of the aforesaid act of June seventeenth, nineteen hundred and two, and shall relinquish all land embraced within his desert land entry in excess of one hundred and sixty acres, and as to such one hundred and sixty acres retained, he shall be entitled to make final proof and obtain patent upon compliance with the terms of payment prescribed in said act of June seventeenth, nineteen hundred and two, and not otherwise. But nothing herein contained shall be held to require a desert land entryman who owns a water-right and reclaims the land embraced in his entry to accept the conditions of said Reclamation Act." Approved June 27, 1906 (34 Stat. 519).

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An act providing for the reappraisement of unsold lots in townsites on reclamation projects, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Secretary of the Interior is hereby authorized, whenever he may deem it necessary, to reappraise all unsold lots within townsites on projects under the Reclamation Act heretofore or hereafter appraised under the provisions of the act approved April sixteenth, nineteen hundred and six, entitled 'An act providing for the withdrawal from public entry of lands needed for townsite purposes in connection with irrigation projects under the Reclamation Act of June seventeenth, nineteen hundred and two, and for other purposes,' and the act approved June twenty-seventh, nineteen hundred and six, entitled 'An act providing for the subdivision of lands entered under the Reclamation Act, and for other purposes'; and thereafter to proceed with the sale of such town lots in accordance with said acts.

"Sec. 2. That in the sale of town lots under the provisions of the said acts of April sixteenth and June twenty-seventh, nineteen hundred and six, the Secretary of the Interior may, in his discretion, require payment for such town lots in full at time of sale or in annual installments, not exceeding five, with interest at the rate of six per centum per annum on deferred payments." Approved June 11, 1910. (Sess. Laws 1910, c. 284, p. 465, 61st Cong., 2d Sess.)

[*Assignment by Entrymen.*]—*An act providing that entrymen for homesteads within reclamation projects may assign their entries upon satisfactory proof of residence, improvement and cultivation for five years, the same as though said entry had been made under the original Homestead Act.*

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, that from and after the filing with the Commissioner of the General Land Office of satisfactory proof of residence, improvement, and cultivation for the five years required by law, persons who have, or shall make, homestead entries within reclamation projects under the provisions of the act of June seventeenth nineteen hundred and two, may assign such entries, or any part thereof, to other persons, and such assignees, upon submitting proof of the reclamation of the lands and upon payment of the charges apportioned against the same as provided in the said act of June seventeenth, nineteen hundred and two, may receive from the United States a patent for the lands: Provided, that all assignments made under the provisions of this act shall be subject to the limitations, charges, terms, and conditions of the Reclamation Act." Approved June 23, 1910. (Sess. Laws 1910, c. 357, p. 592, 61st Cong., 2d Sess.)

[*Reclamation Bonds.*]—*An act to authorize advances to the "reclamation fund," and for the issue and disposal of certificates of indebtedness in reimbursement therefor, and for other purposes.*

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that to enable the Secretary of the Interior to complete government reclamation projects heretofore begun, the Secretary of the Treasury is authorized, upon request of the Secretary of the Interior to transfer from time to time to the credit of the reclamation fund created by the act entitled 'An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands,' approved June seventeenth, nineteen hundred and two, such sum or sums, not exceeding in the aggregate twenty million dollars, as the Secretary of the Interior may deem necessary to com-

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plete the said reclamation projects, and such extensions thereof as he may deem proper and necessary to the successful and profitable operation and maintenance thereof or to protect water-rights pertaining thereto claimed by the United States, provided the same shall be approved by the President of the United States; and such sum or sums as may be required to comply with the foregoing authority are hereby appropriated out of any money in the treasury not otherwise appropriated: Provided, that the sums hereby authorized to be transferred to the reclamation fund shall be so transferred only as such sums shall be actually needed to meet payments for work performed under existing law: And provided further, that all sums so transferred shall be reimbursed to the treasury from the reclamation fund, as hereinafter provided: And provided further, that no part of this appropriation shall be expended upon any existing project until it shall have been examined and reported upon by a board of engineer officers of the army, designated by the President of the United States, and until it shall be approved by the President as feasible and practicable and worthy of such expenditure; nor shall any portion of this appropriation be expended upon any new project.

"Sec. 2. That for the purpose of providing the treasury with funds for such advances to the reclamation fund, the Secretary of the Treasury is authorized to issue certificates of indebtedness of the United States in such form as he may prescribe and in denominations of fifty dollars, or multiples of that sum; said certificates to be redeemable at the option of the United States at any time after three years from the date of their issue and to be payable five years after such date, and to bear interest payable semi-annually, at not exceeding three per centum per annum; the principal and interest to be payable in gold coin of the United States. The certificate of indebtedness herein authorized may be disposed of by the Secretary of the Treasury at not less than par, under such rules and regulations as he may prescribe, giving all citizens of the United States an equal opportunity to subscribe therefor, but no commission shall be allowed and the aggregate issue of such certificates shall not exceed the amount of all advances made to said reclamation fund, and in no event shall the same exceed the sum of twenty million dollars. The certificates of indebtedness herein authorized shall be exempt from taxes or duties of the United States as well as from taxation in any form by or under State, municipal, or local authority; and a sum not exceeding one-tenth of one per centum of the amount of the certificates of indebtedness issued under this act is hereby appropriated, out of any money in the treasury not otherwise appropriated, to pay the expense of preparing, advertising, and issuing the same.

"Sec. 3. That beginning five years after the date of the first advance to the reclamation fund under this act, fifty per centum of the annual receipts of the reclamation fund shall be paid into the general fund of the treasury of the United States until payment so made shall equal the aggregate amount of advances made by the treasury to said reclamation fund, together with interest paid on the certificates of indebtedness issued under this act and any expense incident to preparing, advertising, and issuing the same.

"Sec. 4. That all money placed to the credit of the reclamation fund in pursuance of this act shall be devoted exclusively to the completion of work on reclamation projects heretofore begun as hereinbefore provided, and the same shall be included with all other expenses in future estimates of construction, operation, or maintenance, and hereafter no irrigation project contemplated by said act of June seventeenth, nineteen hundred and two, shall be begun unless and until the same shall have been recommended by the Secretary of the Interior and approved by the direct order of the President of the United States.

"Sec. 5. That no entry shall be hereafter made and no entryman shall be permitted to go upon lands reserved for irrigation purposes until the Secretary of the Interior shall have established the unit of acreage and fixed the water charges and the

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date when the water can be applied and made public announcement of the same. (Sec. 5 was amended by A. C. February 24, 1911, Pub. No. 417, *infra.*)

"Sec. 6. That section nine of said act of Congress, approved June seventeenth, nineteen hundred and two, entitled 'An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands,' is hereby repealed." Approved, June 25, 1910. (Sess. Laws, c. 407, p. 835, 61st Cong., 2d Sess. Amended by A. C. February 24, 1911, Pub. No. 417, *infra.*)

An act granting leaves of absence to homesteaders on lands to be irrigated under the provisions of the act of June seventeenth, nineteen hundred and two.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that all qualified entrymen who have heretofore made *bona fide* entry upon lands proposed to be irrigated under the provisions of the act of June seventeenth, nineteen hundred and two, known as the National Irrigation Act, may, upon application and a showing that they have made substantial improvements, and that water is not available for the irrigation of their said lands, within the discretion of the Secretary of the Interior, obtain leave of absence from their entries, until water for irrigation is turned into the main irrigation canals from which the land is to be irrigated: Provided, that the period of actual absence under this act shall not be deducted from the full time of residence required by law." Approved June 25, 1910 (Sess. Laws 1910, c. 432, p. 864, 61st Cong., 2d Sess.)

An act to provide for the sale of lands acquired under the provisions of the Reclamation Act and which are not needed for the purposes of that act.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that whenever in the opinion of the Secretary of the Interior any lands which have been acquired under the provisions of the act of June seventeenth, nineteen hundred and two (Thirty-second Statutes, page three hundred and eighty-eight), commonly called the 'Reclamation Act,' or under the provisions of any act amendatory thereof or supplementary thereto, for any irrigation works contemplated by said Reclamation Act are not needed for the purposes for which they were acquired, said Secretary of the Interior may cause said lands, together with the improvements thereon, to be appraised by three disinterested persons, to be appointed by him, and thereafter to sell the same for not less than the appraised value at public auction to the highest bidder, after giving public notice of the time and place of sale by posting upon the land and by publication for not less than thirty days in a newspaper of general circulation in the vicinity of the land.

"Sec. 2. That upon payment of the purchase price, the Secretary of the Interior is authorized by appropriate deed to convey all the right, title, and interest of the United States of, in, and to said lands to the purchaser at said sale, subject, however, to such reservations, limitations or conditions as said Secretary may deem proper: Provided, that not over one hundred and sixty acres shall be sold to any one person.

"Sec. 3. That the moneys derived from the sale of such lands shall be covered into the reclamation fund and be placed to the credit of the project for which such lands had been acquired."

Approved February 2, 1911 (Public No. 338).

An act to authorize the Secretary of the Interior to withdraw public notices issued under section 4 of the Reclamation Act, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Secretary of the

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Interior may, in his discretion, withdraw any public notice heretofore issued under section four of the Reclamation Act of June seventeenth, nineteen hundred and two, and he may agree to such modification of water-right applications heretofore duly filed or contracts with water users associations and others, entered into prior to the passage of this act, as he may deem advisable, or he may consent to the abrogation of such water-right applications and contracts, and proceed in all respects as if no such notice had been given."

Approved February 13, 1911 (Public No. 353).

An act to amend section 5 of the act of Congress of June twenty-fifth, nineteen hundred and ten, entitled "An act to authorize advances to the 'reclamation fund,' and for the issue and disposal of certificates of indebtedness in reimbursement therefor, and for other purposes."

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that section five of an act entitled 'An act to authorize advances to the "reclamation fund," and for the issue and disposal of certificates of indebtedness in reimbursement therefor, and for other purposes,' approved June twenty-fifth, nineteen hundred and ten (Thirty-sixth Statutes at Large, page eight hundred and thirty-five), be, and the same hereby is, amended as follows:

"'Sec. 5. That no entry shall be hereafter made and no entryman shall be permitted to go upon lands reserved for irrigation purposes until the Secretary of the Interior shall have established the unit of acreage and fixed the water charges and the date when the water can be applied and make public announcement of the same: Provided, that where entries made prior to June twenty-fifth, nineteen hundred and ten, have been or may be relinquished in whole or in part, the lands so relinquished shall be subject to settlement and entry under the homestead law as amended by an act entitled "An act appropriating the receipts from the sale and disposal of the public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," approved June seventeenth, nineteen hundred and two (Thirty-second Statutes at Large, page three hundred and eighty-eight).'"

Approved February 18, 1911 (Public No. 386).

An act to authorize the government to contract for impounding, storing, and carriage of water, and to co-operate in the construction and use of reservoirs and canals under reclamation projects, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that whenever in carrying out the provisions of the reclamation law storage or carrying capacity has been or may be provided in excess of the requirements of the lands to be irrigated under any project, the Secretary of the Interior, preserving a first right to lands and entrymen under the project, is hereby authorized, upon such terms as he may determine to be just and equitable, to contract for the impounding, storage, and carriage of water to an extent not exceeding such excess capacity with irrigation systems operating under the act of August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, and individuals, corporations, associations, and irrigation districts organized for or engaged in furnishing or in distributing water for irrigation. Water so impounded, stored, or carried under any such contract shall be for the purpose of distribution to individual water users by the party with whom the contract is made: *Provided, however*, that water so impounded, stored, or carried shall not be used otherwise than as prescribed by law as to lands held in private ownership within government reclamation projects. In fixing the charges under any such contract for impounding, storing, or carrying water for any irrigation system, corporation, association, district, or individual, as herein provided, the Secretary shall take into considera-

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tion the cost of construction and maintenance of the reservoir by which such water is to be impounded or stored and the canal by which it is to be carried, and such charges shall be just and equitable as to water users under the government project. No irrigation system, district, association, corporation, or individual so contracting shall make any charge for the storage, carriage, or delivery of such water in excess of the charge paid to the United States except to such extent as may be reasonably necessary to cover cost of carriage and delivery of such water through their works.

"Sec. 2. That in carrying out the provisions of said Reclamation Act and acts amendatory thereof or supplementary thereto, the Secretary of the Interior is authorized, upon such terms as may be agreed upon, to cooperate with irrigation districts, water users associations, corporations, entrymen or water users for the construction or use of such reservoirs, canals, or ditches as may be advantageously used by the government and irrigation districts, water users associations, corporations, entrymen or water users for impounding, delivering and carrying water for irrigation purposes: *Provided,* that the title to and management of the works so constructed shall be subject to the provisions of section six of said act: *Provided further,* that water shall not be furnished from any such reservoir or delivered through any such canal or ditch to any one landowner in excess of an amount sufficient to irrigate one hundred and sixty acres: Provided, that nothing contained in this act shall be held or construed as enlarging or attempting to enlarge the right of the United States, under existing law, to control the waters of any stream in any State.

"Sec. 3. That the moneys received in pursuance of such contracts shall be covered into the reclamation fund and be available for use under the terms of the Reclamation Act and the acts amendatory thereof or supplementary thereto."

Approved, February 21, 1911 (Public No. 406).

An act to amend an act entitled "An act providing for the withdrawal from public entry of lands needed for townsite purposes in connection with irrigation projects under the Reclamation Act of June seventeenth nineteen hundred and two, and for other purposes," approved April sixteenth, nineteen hundred and six.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section five of an act entitled 'An act providing for the withdrawal from public entry of lands needed for townsite purposes in connection with irrigation projects under the Reclamation Act of June seventeenth, nineteen hundred and two, and for other purposes,' approved April sixteenth, nineteen hundred and six, be amended so as to read as follows:

"'Sec. 5. That whenever a development of power is necessary for the irrigation of lands, under any project undertaken under the said Reclamation Act, or an opportunity is afforded for the development of power under any such project, the Secretary of the Interior is authorized to lease for a period not exceeding ten years, giving preference to municipal purposes, any surplus power or power privilege, and the money derived from such leases shall be covered into the reclamation fund and be placed to the credit of the project from which such power is derived: *Provided,* that no lease shall be made of such surplus power or power privileges as will impair the efficiency of the irrigation project; *Provided, further,* that the Secretary of the Interior is authorized, in his discretion, to make such a lease in connection with Rio Grande Project in Texas and New Mexico for a longer period not exceeding fifty years, with the approval of the water users' association or associations under any such project, organized in conformity with the rules and regulations prescribed by the Secretary of the Interior in pursuance of section six of the Reclamation Act approved June seventeenth, nineteen hundred and two.'"

Approved, February 24, 1911 (Public No. 417).

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See, also, 33 Stat. 347, 352, 359, regarding homestead entries under the Reclamation Act; 35 Stat. 44, March 16, 1908, extending time for residence on Huntley Project, Montana; Sess. Laws 1909–10, 61st Cong., 2d Sess., p. 422 appropriating for investigation of utilization of reclaimed lands; *Ibid.*, p. 583, withdrawing coal lands in connection with projects; *Ibid.*, p. 858 et seq., regarding Indian allotments in connection with reclamation projects.

At this writing, some amendments are pending in the extra session of Congress.

Text, c. 23.

Debris Act.—27 Stats. at Large, 507; amended February 27, 1907, 34 Stat. 1001, c. 2077. The act of Congress provides for the appointment of three army engineers to be known as the California Debris Commission. Its jurisdiction, so far as it affects hydraulic mining, extends to the territory drained by the Sacramento and San Joaquin Rivers. Hydraulic mining, directly or indirectly, injuring the navigability of said river systems, except as permitted under the provisions of the act, is prohibited. The commission is directed to adopt plans to prevent damage from debris resulting from mining operations, with a view of restoring the navigability of said rivers to the condition existing in 1860, and of permitting hydraulic mining so far as it can be done "without injury to the navigability of said rivers or the lands adjacent thereto." Any person or persons who desire to operate a mine, or mines, by hydraulic process must file with the commission a verified petition and a release or surrender to the United States of the right or privilege to regulate the manner in which the debris from such mines shall be restrained and the amount of debris that may be produced from such mines. Thereupon a notice, specifying the contents of the petition and fixing a time previous to which all proofs are to be submitted, is to be published in a daily paper, or in three issues of a weekly paper. On or before the time fixed "all parties interested, either as petitioners or contestants, whether miners or agriculturists, may file affidavits, plans and maps, in support of their respective claims. Further hearing, upon notice to all parties of record, may be granted by the commission when necessary."

If "within thirty days after the time so fixed" a majority of the commission decide in favor of the petitioner the commission must thereupon make an order specifying in detail the method and manner of operating such mine, the restraining works to be built, the location and material thereof, and such further safeguards "as will protect public interests and prevent injury to the

[Debris Act]
navigable rivers, and the lands adjacent thereto," all to be done at the expense of the miner.

The mine owner must then construct the prescribed works, under the supervision of the commission, and upon the completion thereof "permission shall thereupon be granted to the owner or owners of such mine or mines to commence mining operations subject to the conditions of said order and the provisions of this act." The order may be modified from time to time and the permission may be suspended, as conditions may demand. The act contains many other provisions relating to the administrative duties and powers of the board.

By act February 27, 1907 (34 Stats. at Large, 1001), the Debris Act is amended, giving the commission power to license mining without restraining works, etc., where properly it can be done, and exempting from mining tax.

Irrigation Investigation.—Congress has frequently appropriated money for irrigation reports and investigations. See 25 Stat. 618, 619, 526, 960; 26 Stat. 504, 526; 27 Stat. 74, 76, 734, 741; 28 Stat. 264, 271, 727, 735; 30 Stat. 330, 335, 947, 953; 31 Stat. 191, 199, 200, 922, 936; 32 Stat. 286, 302, 1147, 1165; 33 Stat. 276, 294, 861, 882; also A. C. February 14, 1907, and subsequent appropriation bills.

Congress has provided for irrigation by Indians on reservations. 31 Stat. 1058, 1075; 33 Stat. 1048, 1060. Questions concerning rights of Indians also involve treaties.

The Public Survey.—The only statutory authority for the meandering of any stream or body of water is to be found in the first paragraph of section 2395, the second paragraph of section 2396, sections 2399 and 2407 of the Revised Statutes of the United States, and the act of October 1, 1890 (26 Stat. 650). Further rules appear in the "Manual of Instructions" of the Division of Public Surveys of the General Land Office.

Miscellaneous.—See 25 Stat. 505, par. 4, 1 Supp. Rev. Stats. 626 (1888); 25 Stat. 939, par. 4, 1 Supp. Rev. Stats. 698 (1889); 26 Stat. 371, par. 4, 1 Supp. Rev. Stats. 791, 792 (1891); 29 Stat. 599, 2 Supp. Rev. Stats. 563 (1897); 32 Stat. at Large, 677, 704 (concerning Philippines).

[Miscellaneous]

A. C. February 20, 1909 (35 Stat. 641, Public No. 248), withdraws San Bernardino Valley lands in California from entry, with a general license to distribute water over them in order to have it sink and replenish the ground-waters. See 37 Land Dec. 375.

Federal Statutes Construed.—In the earlier parts of this book (Parts I to VII, inclusive) Federal Statutes are construed or cited upon the following pages:

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(3d ed.)
§ 1430. ALASKA.

The Alaska act of Congress of June 6, 1900, 31 Statutes at Large, 321, section 15, provides for the record of "waters and declaration of water-rights," but leaves their form and effect to local mining district rules. The rules of one Alaska district[7] are substantially a copy of sections 1410 to 1422 of the California Civil Code.

As a general principle, the Federal public land legislation does not apply to Alaska unless made to do so by special mention.[8] Consequently the land office ruled that it would not receive filings under the Federal Right of Way Act of March 3, 1891.[9] But it is held that the act of 1866,[10] recognizing the doctrine of prior appropriation of water and rights of way upon public land, is in force in Alaska.[11]

There are no specific statutes in Alaska upon water appropriation.[12] The laws of Oregon govern to some extent.[13] In Carter's Annotated Alaska Codes, sections 5 and 33, appear statutes making pollution of water by refuse or poison a crime.

The common law is adopted in Alaska in general terms, irrespective of the law of waters. (Civ. Code, sec. 367; Pen. Code, sec. 218.)[14] But after some uncertainty, the weight of authority now holds that the common law of riparian rights is not in force.[15]

7 Quoted in Thorndyke v. Alaska etc. Co. (1908), 164 Fed. 657, 90 C. C. A. 473.

8 Martin v. Burford (C. C. A.), 181 Fed. 922.

9 35 Land Dec. 297.

10 Rev. Stats. U. S., secs. 2339, 2340.

11 Van Dyke v. Midnight Sun Co., 177 Fed. 85, 100 C. C. A. 503; McFarland v. Alaska etc. Co., 3 Alaska, 308; Revenue M. Co. v. Balderston, 2 Alaska, 363. See, also, 26 Land Dec. 305. See *contra (semble)*, Ketchikan Co. v. Citizens' Co., 2 Alaska, 120.

12 Miocene D. Co. v. Jacobsen, 146 Fed. 680, 77 C. C. A. 106.

13 Noland v. Coon, 1 Alaska, 36.

14 McFarland v. Alaska etc. Co., 3 Alaska, 308; McClaskey v. Pac. Coast etc. Co., 160 Fed. 794, 87 C. C. A. 856.

15 Van Dyke v. Midnight Sun Co., 177 Fed. 85, 100 C. C. A. 503, and cases cited *supra*, sec. 118.

Alaska Statutes Construed.—In the earlier parts of this book (Parts I to VII, inclusive) Alaska Statutes are construed or cited upon the following pages:

Code, c. 22, sec. 204 662
Carter's Ann. Code 1900, secs. 5, 33 569

(3d ed.)
§ 1431. ARIZONA.

Constitution.
Declaration of public ownership.
Concerning riparian rights.
Miscellaneous.
Arizona statutes construed.

The law of Arizona is covered by the chapter in Revised Statutes of 1901, page 1045. For the history of the Arizona law as borrowed from that of New Mexico and Sonora, see Boquillas etc. Co. v. Curtis, 11 Ariz. 128, 89 Pac. 504; 213 U. S. 339, 29 Sup. Ct. Rep. 493, 53 L. Ed. 822. There was no legislation in 1911.

Constitution.—The constitution of 1910 (not yet ratified by Congress) contains the following in article 17:

Sec. 1. "The common-law doctrine of riparian water-rights shall not obtain or be of any force or effect in the State."

Sec. 2. "All existing rights to the use of any of the waters in the State for all useful or beneficial purposes are hereby recognized and confirmed."

There are the usual provisions protecting property, and concerning eminent domain; and article 22, section 2, continues all existing laws not repugnant to the constitution. Article 10, section 5, and article 20, section 10, provide co-operation with the United States Reclamation Service.

Text, § 170.

Declaration of Public Ownership.—Revised Statutes of 1901, section 4174 (Civil Code): "All rivers, creeks, and streams of running water in the Territory of Arizona are hereby declared public, and applicable to the purposes of irrigation and mining as hereafter provided." The system there provided is in many respects peculiar to Arizona.

Text, § 118.

Concerning Riparian Rights.—Revised Statutes of 1901, section 4168 (Civil Code): "The common-law doctrine of riparian water-rights shall not obtain or be of any force in this Territory." The court follows the Colorado system rejecting riparian rights *in toto.*

Miscellaneous.—By the statutory Bill of Rights, article 22, all streams capable of being used for the purposes of irrigation are

[Miscellaneous]

declared to be public property, and no one shall have the right to appropriate them exclusively except under such equitable regulations as the legislature shall provide. In another chapter (55), "Of Acequias or Irrigating Canals," after again declaring streams of running water public, section 1, enacts that "all the inhabitants of this territory who own or possess arable and irrigable lands shall have the right to construct public or private acequias, and obtain the necessary water for the same from any convenient river, creek, or stream of running water," section 3. By section 4, when such acequias run through the lands of private persons not benefited, the damages are to be assessed by the probate judge in a summary manner, on application of the party interested. By section 5 preference is given to irrigation over other uses. By section 7 the exclusive right to the water is given to the persons taking out a ditch for agricultural purposes, and a right to damages if the water afterward is taken for mining. By section 17 precedence is given in time of scarcity to the oldest titles, and by section 25, "the regulations of acequias which have been worked according to the laws and customs of Sonora and the usages of the people of Arizona shall remain as they were made and used up to this day."

By the Statute of 1907, page 170, there is an exemption from taxation of dams and reservoirs hereafter constructed for irrigation, watering stock, mining, and generating electricity.

Arizona Statutes Construed.—In the earlier parts of this book (Parts I to VII, inclusive) Arizona Statutes are construed or cited upon the following pages:

Constitution.

Art. 1, sec. 17 249
Art. 2, sec. 4 648
Art. 2, sec. 17 649
Art. 10, sec. 6 237
Art. 17, sec. 1 153

Revised Statutes.

Rev. Stats., c. 55, sec. 5 324
Rev. Stats. 1901, p. 1045 150
Rev. Stats. 1901, sec. 2935 ..... 629, 639
Rev. Stats. 1901, sec. 4168 (Civ. Code) 153
Rev. Stats. 1901, sec. 4169 387
Rev. Stats. 1901, sec. 4174 194
Stats. 1907, p. 170 301

(3d ed.)

§ 1432. CALIFORNIA.

Constitution.
Declaration of State or public ownership.
Administration.
Concerning riparian rights of private land.
Appropriation of water on public land.
Water-power Act of 1911.
Interstate waters.
Percolating water.
Mineral waters.
Navigable waters.
Hydraulic mining.
Eminent domain.
Public service—Water companies and consumers—Constitution.
Public service—Civil Code.
Public service—General statutes.
Mutual companies.
Municipal ownership.
Irrigation district statutes.
Reclamation districts.
Injunctions.
Penal statutes.
Public Health Act.
Miscellaneous.
California statutes construed.

Constitution.—The constitution contains, in article 14, a provision declaring use of water for sale, rental or distribution a public use, subject to State control. (Quoted below under the topic of "Public Service.") It also contains the following:

Article 1, section 13. "No person shall be . . . . deprived of life, liberty or property without due process of law."

Article 1, section 14. "Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court, for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law." (An amendment is pending, to be voted

[Constitution]
upon at the next election. See Stats. 1911, Senate Amendment 17, c. 9.)

Text, § 170.
Declaration of State Ownership.—Civil Code, section 1410, as amended in 1911, declares waters "the property of the people of the State of California." (Quoted below.)

Text, § 611.
Administration.—There is a considerable body of statutes governing distribution of water to public uses, leaving regulation to the local boards of supervisors. These are below quoted under the head of "Public Service." In 1911 the legislature proposed a constitutional amendment to create a Public Service Commission.

State Engineer, Board of Control, Department of Engineering and Conservation Commission.—See Stats. 1909, c. 704; Stats. 1911, c. 409. By the latter the governor is to appoint five persons as a consulting board to the Department of State Engineering "upon all matters that affect irrigation, drainage and river improvement." By Statutes of 1911, chapter 408, a Conservation Commission is appointed to investigate water and water laws, and other things. By Statutes of 1911, chapter 406, a board of control is appointed to govern water-power uses (below quoted). As yet the State Engineer or such boards have not been operative in California. An act of 1854, page 76, provided for water commissioners but was little operative. In 1903 (Works Bill) and 1909 (Black Bill) water codes based upon the Wyoming system were introduced, but did not pass.

Text, § 117.
Concerning Riparian Rights of Private Land.—An act of 1863–64, page 375, section 10, contained a provision that "No person or persons shall divert the water of any river or stream from its natural channel to the detriment of any person or persons located below them on the stream."

The title of the Civil Code, quoted under the next heading, enacting the law of prior appropriation for waters upon the public domain, had, as originally enacted, ended with the declaration in section 1422: "The rights of riparian proprietors are not affected by the provisions of this title."

In the session of 1887 (Stats., p. 114), the year following the decision of Lux v. Haggin, 69 Cal. 255, section 1422 was repealed with the proviso "that the repeal of this section shall not in any

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way interfere with any rights already vested." The effect of this repeal has never been directly passed upon by the court, but many cases since then have affirmed the rights of riparian proprietors, following Lux v. Haggin. The fact that this repeal has not disturbed the California law indicates that Lux v. Haggin is taken to have upheld riparian rights as much upon constitutional principles as on section 1422 of the code. This is fully considered in the historical chapters of the text.

There is some occasional mention in chance sections in other statutes, referring to riparian rights; e. g., Code Civ. Proc., sec. 1248, and Civ. Code, sec. 1416 (as amended in 1907), and Pol. Code, sec. 4043. But the law of riparian rights in California today is nonstatutory.

The common law of riparian rights governs waters which, at the time diversion is begun, flow over or by private land in California.

Text, cc. 10, 11 and 17.

Appropriation of Water on Public Land.—*Civil Code, Division Second, Title VIII—Water-rights.*—These sections are primarily public land law, as streams on private land are governed by the law of riparian rights just mentioned. See the chapters in the text referred to.

Section 1410. "All water or the use of water within the State of California is the property of the people of the State of California, but the right to the use of running water flowing in a river or stream or down a canyon or ravine may be acquired by appropriation in the manner provided by law, provided that no water for the generation of electricity or electrical or other power may be appropriated for a longer period than twenty-five years, except by a municipal corporation, other than an irrigation district or a lighting district, or by an irrigation district when such electricity, electrical or other power is for use and distribution only within its own limits, and as subsidiary to and mainly for the purpose of serving and carrying out irrigation, or by a lighting district when such electricity, electrical or other power is for use and distribution only within its own limits." As amended by Stats. 1911, c. 407.

Until 1911 section 1410 read: "The right to the use of running water flowing in a river or stream, or down a canyon or ravine, may be acquired by appropriation." En. March 21, 1872.

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Section 1411. Appropriation must be for a Useful Purpose. "The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases." En. March 21, 1872.

Section 1412. Point of Diversion may be Changed. "The person entitled to the use may change the place of diversion, if others are not injured by such change, and may extend the ditch, flume, pipe, or aqueduct by which the diversion is made to places beyond that where the first use was made." En. March 21, 1872.

Section 1413. Water may be Turned into Natural Channels. "The water appropriated may be turned into the channel of another stream and mingled with its water, and then reclaimed; but in reclaiming it the water already appropriated by another must not be diminished." En. March 21, 1872.

Section 1414. First in Time, First in Right. "As between appropriators, the one first in time is the first in right." En. March 21, 1872.

Section 1415. Notice of Appropriation. "A person desiring to appropriate water must post a notice, in writing, in a conspicuous place at the point of intended diversion, stating therein:

"1. That he claims the water there flowing to the extent of (giving the number) inches measured under a four-inch pressure;

"2. The purposes for which he claims it, and the place of intended use;

"3. The means by which he intends to divert it, and the size of the flume, ditch, pipe, or aqueduct in which he intends to divert it.

"A copy of the notice must, within ten days after it is posted, be recorded in the office of the recorder of the county in which it is posted.

"After filing such copy for record, the place of intended diversion or the place of intended use or the means by which it is intended to divert the water, may be changed by the person posting said notice or his assigns, if others are not injured by such change. This provision applies to notices already filed as well as to notices hereafter filed." En. March 21, 1872. Amd. 1903, 361.

Section 1416. "Within sixty days after the notice is posted, the claimant must commence the excavation or construction of the

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works in which he intends to divert the water, or the survey, road or trail building, necessarily incident thereto, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by snows or rain; provided, that if the erection of a dam has been recommended by the California Debris Commission at or near the place where it is intended to divert the water, the claimant shall have sixty days after the completion of such dam in which to commence the excavation or construction of the works in which he intends to divert the water; provided, that whenever any city and county, or any incorporated city or town within this State makes, or has made, or acquires, or has acquired any appropriation of any of the waters of this State in accordance with the provisions of section 1415 of this code, it shall not be necessary for such city and county, city or town to commence the work for development of more of the water so claimed than is actually necessary for the immediate needs of such city and county, city or town and it shall be held to be a sufficient compliance with the requirements of this chapter, to the full amount of water stated in the notice posted and recorded, for such city and county, city or town to within sixty days make the necessary surveys, or within six months to authorize the issuance of municipal bonds, for the construction of the necessary works designed to supply such city and county, city or town with the water required for immediate use. Any appropriation heretofore made by any such city and county, city or town in connection with which surveys were at any time made, or an issue of bonds authorized for the construction of any portion of the works necessary for a diversion of any part of the water appropriated, is hereby confirmed to the full amount of water stated in the original notice or notices." En. March 21, 1872; amd. 1895, p. 70; 1903, p. 396; 1907, c. 429; 1911, c. 730.

The above is the section as amended in 1911, chapter 730. An amendment of 1907, chapter 429, which the above does not preserve, had contained the following provisos in place of those following the words "in which he intends to divert the water," viz.:

"*And provided further,* that if it shall be necessary, by proceedings in eminent domain, to acquire water-rights held by adverse riparian owners or to acquire sites for dams or power plants at the point of intended diversion or the point of intended use, as described in the notice of appropriation of said water, or if there shall be conflicting claims to the waters so appropriated, then the party so appropriating, or his assigns, shall have sixty days after the determination of legal proceedings by final judgment in which to commence to excavate or construct the works in which he intends to divert the water

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as provided in this section; *and provided further,* that if suits for such purpose are not already pending at the date of the passage of this act, they shall be commenced within sixty days after this act takes effect, and as to future appropriations of water, within sixty days after notice of such appropriation is posted as required by law, and such proceedings shall be prosecuted diligently to final judgment; but nothing in this act shall be construed to revive or renew appropriations of water heretofore made which have been abandoned and lost, as against subsequent claimants who have complied with this act."

Section 1417. Completion Defined. "By completion is meant conducting the waters to the place of intended use." En. March 21, 1872.

Section 1418. Doctrine of Relation Applied. "By a compliance with the above rules the claimant's right to the use of the water relates back to the time the notice was posted." En. March 21, 1872.

Section 1419. Forfeiture. "A failure to comply with such rules deprives the claimants of the right to the use of the water as against a subsequent claimant who complies therewith." En. March 21, 1872.

Section 1420. Rights of Present Claimant. "Persons who have heretofore claimed the right to water, and who have not constructed works in which to divert it, and who have not diverted nor applied it to some useful purpose, must, after this title takes effect, and within twenty days thereafter, proceed as in this title provided, or their right ceases." En. March 21, 1872.

Section 1421. Recorder to Keep Book in Which to Record Notices. "The recorder of each county must keep a book, in which he must record the notices provided for in this title." En. March 21, 1872.

Section 1422. Appropriations on Government Reservations, Forest Reserves, etc. "If the place of intended diversion or any part of the route of intended conveyance of water so claimed, be within, and a part of, any national park, forest reservation, or other public reservation, and be so shown in the notice of appropriation of said water, then the claimant shall have sixty days, after the grant of authority to occupy and use such park or reservation for such intended purpose, within which to commence the excavation or construction of said works; provided that within sixty days after the posting of said notice of appropriation, as provided

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in section 1415 of the Civil Code, the claimant shall in good faith commence (and thereafter diligently and continuously, except when temporarily interrupted by snow or rain, prosecute to completion) such surveys and other work as under the regulations governing such park or reservations, may be required as preliminary to, or for use with, an application for such authority; and provided also that the claimant shall in good faith, on completion of said survey and preliminary work, apply to the officer, board, or body, having charge of such park or reservation, for such authority, and shall thereafter prosecute said application with reasonable diligence." En. March 21, 1872. Rep. 1887, 114. En. 1903, p. 397.

As originally enacted, section 1422 read: "The rights of riparian proprietors are not affected by the provisions of this title."

Text, cc. 18 and 19.

Water-power Act of 1911.—Statutes of 1911, chapter 406, approved April 8, 1911.

"*An act regulating and limiting the appropriation of water for generating electricity or electrical or other power; fixing the terms and conditions and providing the manner and procedure upon which water for generating electricity or electrical or other power may be appropriated and providing for the renewal of licenses granted hereunder; providing for the issuing of licenses for the use of water for generating electricity or electrical or other power and limiting rights under such licenses; prohibiting the appropriation of water or the use of water for generating electricity or electrical or other power for a longer period than twenty-five years; limiting the right to the use of water appropriated for generating electricity or electrical or other power to the specific purposes for which it is appropriated; declaring certain water to be unappropriated; providing for the granting of licenses to divert and store surplus and flood waters for generating electricity, or electrical or other power and declaring what is surplus water; reserving to the State the right to regulate and fix the rates of compensation for which electricity or electrical or other power generated by water appropriated may be sold, rented or distributed; reserving to the State the right to impose charges for the use of water appropriated for electricity or electrical or other power and fixing fees and charges; preventing the combination or formation of any unlawful trust by appropriators of water or the use of water for generating electricity or electrical or other power and providing a penalty therefor; creating and establishing a State board of control; providing the powers and duties of said board of control and fixing their compensation; compelling persons, firms, associations and corporations supplying electricity or electrical or other power generated by the use of appropriated water to keep their plants and systems in repair and requiring an annual report from them to said board of control; providing for the appointment and compensation of employees and assistants to said board of control; limiting the expenses of said board of control and providing for the*

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payment thereof; fixing the place of business of said board of control; declaring the diversion or use of water for generating electricity, or electrical or other power, otherwise than provided in this act, to be a misdemeanor and providing a penalty therefor, and also providing penalties for other violations of this act; repealing all acts and parts of acts in conflict with this act.

"*The people of the State of California, represented in senate and assembly, do enact as follows:*

"Section 1. Water or the use of water for the generation of electricity or of electrical or other power shall not be appropriated for a longer period than twenty-five years.

"Sec. 2. Appropriation of water or of the use of water for the generation of electricity or of electrical or other power shall be made as provided by this act, and not otherwise.

"Sec. 3. Water or the use of water appropriated for purposes other than the generation of electricity or of electrical or other power shall not be used for the generation of electricity or of electrical or other power except under a separate and distinct appropriation made as provided in this act for such purpose.

"Sec. 4. All water or the use of water which has been heretofore appropriated and which has not been put, or which has ceased to be put to some useful or beneficial purpose, or which is not now in process of being put to some useful or beneficial purpose with due diligence in proportion to the magnitude of the work necessary properly to utilize for the purpose of such appropriation such water or such use of water, is hereby declared to be unappropriated.

"Sec. 5. All appropriations of water or the use of water for generating electricity or electrical or other power shall be subject to the right of the state to regulate and fix the rates of compensation for which such electricity or electrical or other power may be sold, rented or distributed.

"Sec. 6. Any person, firm, association or corporation hereafter intending to appropriate water or the use of water for the generation of electricity, or of electrical or other power, before commencing the construction or enlargement or extension of any building, power-house, ditch, canal or any distributing or controlling works, or performing any work in connection with said appropriation or proposed appropriation, shall make an application in duplicate to the board of control provided for in this act for a permit to make such appropriation. No person, firm, association or corporation shall willfully divert or use water or shall willfully attempt to divert or use water for generating electricity or electrical or other power without first complying with the provisions of this act. The possession or use of water for generating electricity or electrical or other power except when a right to said water or the use thereof shall have been acquired in accordance with law shall be *prima facie* evidence of such willful diversion or use or attempted diversion or use of such water.

"Sec. 7. Every application for a permit to appropriate water or the use of water for the generation of electricity or of electrical or other power shall set forth the residence, or principal place of business if the applicant be a corporation and post-office address of the applicant, the source of the water or the use of water to be appropriated or used, the nature and amount of the proposed use, the head of and amount of water to be utilized, the uses to which the water and electricity or electrical or other power are to be applied, the nature, the location (which may be changed by permission of the board of control), the character, the estimated capacity, and the estimated cost of the works, and whether the water is to be and will be returned to the stream or source from which it is to be taken and if so at what point on the stream or source it is proposed to return said water to said stream or source. If the application is for the construction of a reservoir for the purpose of storing water to be used for the generation of electricity or of electrical or other power, it shall give

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the estimated height of the dam and the estimated capacity of the reservoir in addition to the other requirements above set forth. All applications shall be accompanied by such maps and drawings in duplicate and such other data in duplicate as may be prescribed by the board of control, and such accompanying data shall be considered as a part of the application. A true copy of such application without such accompanying data and maps and drawings shall be recorded by the applicant in the office of the recorder of the county, or city and county, in which the proposed works are to be erected, within ten days after said application is filed with said board.

"Sec. 8. Upon receipt of an application under this act it shall be the duty of the board of control immediately to cause to be made an indorsement thereon of the date of its receipt and to keep the duplicate of said application and its indorsement on file as a record of the same. The board of control shall immediately examine the said application after it has been filed. If upon such examination the application is found to be defective, one copy of it and its accompanying data, maps and drawings shall be returned to the applicant for correction or completion, and the date of and reasons for the return thereof shall be indorsed thereon and a record kept of such indorsement in the office of the board of control. No application shall lose its priority of filing on account of such defect, provided a proper application is filed in the office of the board of control within thirty days of the date of said return to the applicant. It shall be the duty of the board of control within six months to enter an order directing the rejection of such application if after further hearing the public interests shall seem to the board of control so to demand. Applications may be approved for a less amount of water or the use of water than that applied for, if there exist substantial reasons therefor, but in any event shall not be approved for more water or the use of water than can be applied to the use for which application is made under an efficient and economical use thereof.

"Sec. 9. The approval or rejection of an application shall be indorsed thereon and a record made of such indorsement in the office of the board of control. One copy of the application so indorsed shall be returned immediately to the applicant in person or by registered mail. If said application be approved, the applicant shall immediately record said approved application, together with the indorsement thereon, in the office of the recorder of the county, or city and county, in which the proposed works are to be constructed and shall be authorized on receipt of said approval and on recording the same, to proceed with the construction of the necessary works and to take all steps required to apply the water or the use of the water to the purpose of generating electricity or electrical or other power as provided in the approved application, and to perfect the proposed appropriation, provided, however, that no right in or to such water or the use thereof shall vest in or accrue to the said applicant until the final permit is issued as is hereinafter provided.

"Sec. 10. Actual construction work shall begin within six months from the date of the approval of the application and the construction of the work shall thereafter be prosecuted with reasonable diligence in proportion to the magnitude of the undertaking, and if such work is not so commenced and prosecuted the board of control may revoke its approval of the application; and such work shall be completed within a reasonable time as fixed in the permit not to exceed five years from the date of such approval. Upon application of the proposed appropriator the board of control may for good cause shown extend the time within which such work shall be completed under any permit but no such extension shall be for a longer period than one year beyond the period fixed in the permit.

"Sec. 11. Upon the completion of the works for the diversion and application of water or the use of water under this act the holder of such permit or his assigns shall report such

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completion to the board of control, and the board of control without delay shall cause to be made a full inspection and examination of the works constructed and a report upon their construction and condition and whether or not they conform to the terms of the application and permit and are adequate for the purposes intended.

"Sec. 12. Upon the receipt of such report, the board shall, if the law has been fully complied with, and if the work shall have been completed in accordance with the application, issue a license to the applicant or his assigns, allowing him or them to divert and use said water or so much thereof as may be necessary for the use proposed, for a certain period of time therein specified, but in no case for more than twenty-five (25) years. Licenses granted upon application made under this act for water or the use of water shall be numbered consecutively as to each stream or other source in the order as to the dates when such applications are filed.

"Sec. 13. Said license shall set forth the name of the licensee, his place of residence, and if a corporation or firm or association the date of its organization and its principal place of business, the stream or source from which the water is to be diverted or used, the quantity of water the licensee is authorized to divert from the stream or source, the point or points on said stream or source at which said water is to be diverted or used, the location of the proposed works, the period of time for which the water may be used, which in no case shall be for more than twenty-five years, by what means and the purposes for which the licensee is authorized to use the same.

"Sec. 14. Any license issued as above provided for water or the use of water appropriated under this act shall vest in the licensee the right to the use of the amount of water mentioned therein for the period of time therein set forth, in the manner and for the purposes therein mentioned and not otherwise, provided that such license shall not impair or affect any rights to water or the use of water which shall have become vested prior to the making of the application above provided for.

"Sec. 15. Any appropriator of water or the use of water under the provisions of this act for the purpose of generating electricity or electrical or other power, or the successor or assigns of said appropriator, if a renewal or extension of the license herein provided for is desired, shall, not less than one or more than two years prior to the termination of the license granted as herein provided, notify the board of control that a renewal and extension of such license is desired. The board of control shall thereupon issue to said appropriator a renewal and extension of said license for a fixed period but in no case for more than a period of twenty-five years from the date of such renewal in compliance with such laws of the State as shall then be in force regulating the renewal, issuing and granting of any license for water or the use of water for generating electricity or electrical or other power.

"Sec. 16. No license for the appropriation of water or the use of water as herein provided shall be valid as to any excess of the capacity of the works actually constructed.

"Sec. 17. The board of control may upon application made therefor in the manner provided in this act and upon like procedure, grant to any person, firm, association or corporation a license to divert and store for the purpose of generating electricity or electrical or other power the surplus waters of any stream during floods or high water or during those portions of the year when such water is not required or being stored for irrigation purposes, and for the purpose of this act all water which is not used during the season of flood or high water is declared to be surplus water.

"Sec. 18. All appropriations of water or the use of water for generating electricity or electrical or other power heretofore or hereafter made shall be subject to the right of the State to impose the fees and charges herein provided and shall also be subject to the right of the

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State to increase or decrease such fees and charges from time to time thereafter.

"Sec. 19. Every person, firm, association or corporation making application for permission to appropriate water or the use of water under this act shall at the time of filing the said application pay to said board of control a fee of ten dollars. Every person, firm, association or corporation at the time of receiving a license to appropriate water or the use of water as provided in this act shall pay to said board a fee of one hundred dollars and also shall pay to said board when the said license is issued, and in addition thereto and annually thereafter shall pay to said board a charge for each theoretical horse-power of the works estimated as follows: For the first one hundred (100) horse-power there shall be no charge; and for all above one hundred (100) horse-power ten (10) cents for each horse-power. All fees collected shall be accounted for at the following regular meeting of the board of control and paid by said board into the general fund of the state treasury within thirty days thereafter.

"Sec. 20. For the purpose of carrying out the provisions of this act, a board of control, to consist of five persons, is hereby created and established. Three members of said board shall be appointed by the governor for a term of four years, provided, that the members first appointed shall be appointed so that one of them shall go out of office at the end of one year, one at the end of two years, and one at the end of three years. The governor and the State Engineer are hereby made *ex-officio* members of said board of control in addition to the three members appointed by the governor. The appointed members of said board shall receive as compensation for services rendered by them, as such members, the sum of ten (10) dollars per day for each day's service actually rendered. If, however, there shall, hereafter, be created by law, any State board or commission having power to regulate or fix rates to be charged for services rendered, or commodities furnished, by public utilities, or by persons or corporations engaged in public service business, or if any State board or commission now existing shall hereafter have such powers conferred upon it, then the powers and duties of the board of control herein created shall vest in and be exercised by such board or commission, and said board of control shall thereupon cease to exist.

"Sec. 21. The board of control is hereby authorized and empowered to do and perform the acts and things required of it by this act and to adopt rules and regulations necessary to carry out the provisions of this act, and it shall be the duty of the board to provide for the public hearing upon the merits of all applications filed with the board and to prescribe the rules of procedure to be observed at such hearings.

"Sec. 22. Every member of said board of control is hereby authorized to administer oaths and to cause the production of persons, papers, records and books in all matters of business transacted before said board.

"Sec. 23. A full and accurate record of the business transacted or acts performed by any member of the board of control and the proceedings of the meetings of said board shall be kept and shall be placed on file in the office of said board of control.

"Sec. 24. For the purpose of carrying out the provisions of this act, the said board of control is authorized to employ such expert, technical, professional and clerical assistance and upon such terms as it may deem proper. For the purpose of carrying out the provisions of this act during the sixty-third and sixty-fourth fiscal years the sum of fifty thousand (50,000) dollars is hereby appropriated out of the funds of the State not otherwise appropriated, and the State controller is hereby authorized and directed to draw warrants upon such sum from time to time, upon the requisition of the State board of control approved by the board of examiners, and the State treasurer is hereby authorized and directed to pay such warrants.

"Sec. 25. All indebtedness incurred for salaries and all necessary

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costs and traveling and other expenses of said board and each of its members and persons employed by it while actually engaged in the business of said board, shall be paid by the State out of the funds hereby appropriated upon a sworn statement of the person or persons incurring such indebtedness and upon the approval of the board of control and the State board of examiners upon warrants drawn upon the State treasurer as provided by law for the payment of similar costs and expenses and the drawing of similar warrants.

"Sec. 26. All persons, firms, associations or corporations generating electricity or electrical or other power by water or the use of water appropriated under the provisions of this act shall keep their plants and systems in proper repair and shall upon the first day of January after the passage of this act, and annually thereafter report to said board of control the condition of their plants and distributing systems, the number of kilowatt hours of electricity or electrical or other power generated during each month of said year, the number of kilowatt hours of electricity or electrical or other power rented, sold or distributed during each month of said year and the names of the persons, firms, associations or corporations to whom said power has been rented, sold or distributed.

"Sec. 27. The board of control shall maintain its office at Sacramento, California. The Secretary of State shall furnish and set aside in the capitol rooms suitable for offices for said board of control, and if the Secretary of State shall make and file an affidavit with the said board that it is not possible for him as such Secretary of State to provide offices for said board in the capitol, then the said board may rent rooms suitable for offices, and said rental shall be deemed a necessary expense of said board.

"Sec. 28. No person, firm, association or corporation appropriating water or the use of water hereunder shall enter into any agreement, combination or trust in restraint of trade contrary to law, and if any of the works owned or operated by any licensee under this act or his assign or assigns shall be owned, leased, trusteed, possessed or controlled by any device, permanently, temporarily, directly or indirectly, tacitly, or in any manner whatsoever so that it or they form a part of or in any way affect any combination, or if it or they are in anywise controlled by any combination or conspiracy to limit the output of electricity or electrical or other power, or to increase the price at which electricity or electrical or other power is sold, rented or distributed, or to prevent the lowering of said price or in restraint of trade with foreign nations or between two or more States or Territories or with any State or Territory in the generation, sale, distribution of electricity or electrical or other power, all rights to the appropriation of water or the use of water shall cease and be forfeited to the people of the State by proceedings instituted in the courts for that purpose by the attorney general of the State either upon his own initiative or upon demand of the board of control.

"Sec. 29. Any violation of the provisions of this act or of any order or regulation of the board of control is hereby declared to be a misdemeanor and shall be punished by a fine not exceeding five thousand (5,000) dollars, or by imprisonment in the county jail not exceeding one (1) year, or by both such fine and imprisonment. It shall be the duty of the board of control to enforce the provisions of this act and to prosecute violations thereof, by proceeding in a court of competent jurisdiction, against any person, firm, association or corporation violating any such provision or failing or refusing to comply with any regulation or requirement of the board of control made pursuant to the provisions of this act.

"Sec. 30. None of the provisions of this act shall apply to municipal corporations, other than irrigation districts or lighting districts, nor to the use by any irrigation district of water for the generation of electricity, electrical or other power only for use and distribution within its own limits, and as subsidiary to and mainly

[Water-power Act of 1911]

for the purpose of serving and carrying out irrigation, nor to the use by any lighting district of water for the generation of electricity, electrical or other power only for use and distribution within its own limits; provided, however, that all municipal corporations, other than irrigation districts and lighting districts, desiring to appropriate water for the generation of electricity, electrical or other power, and all irrigation districts and lighting districts desiring to appropriate water for the generation of electricity, electrical or other power, and all irrigation districts and lighting districts desiring to appropriate water for the generation of electricity, electrical or other power for the uses hereinabove in this section specified shall within ten days from the time that they post and record notices of appropriation, as required by law, file with the board of control a notice of said appropriation, together with the name and postoffice address of the appropriator, the source of the water to be appropriated or used, the nature and amount of the proposed use, the head of an amount of water proposed to be utilized, the uses to which the water and power are to be applied, the nature, location, character, estimated capacity and estimated cost of the works and whether the water is to be and will be returned to the stream or source from which it is to be taken and if so, at what point on said stream or source. If the appropriation contemplates the construction of a reservoir for the purpose of storing water to be used for the generation of electricity or electrical or other power, the notices filed with the board shall also give the estimated height of the dam and the estimated capacity of the reservoir in addition to the other requirements above set forth.

"Sec. 31. Wherever in this act the performance or doing of certain acts or things by any firm, association or corporation is made a misdemeanor, and a penalty provided therefor, the person, officer, member, manager, agent, director or employee of any such firm, association or corporation who by vote, act, authorization, direction, order or request shall have caused such act or thing to be done is likewise and in the same manner guilty of a misdemeanor, and shall be punished likewise and in the same manner as the person actually performing or doing the act or thing.

"Sec. 32. All acts and parts of acts in conflict herewith are hereby repealed.

"Sec. 33. This act shall take effect immediately."

Text, § 340.

Interstate Waters.—Statute of 1911, chapter 104.

"1. It shall be unlawful for any person, firm, association or corporation to transport or carry through pipes, conduits, ditches, tunnels or canals, the waters of any fresh-water lake, pond, brook, creek, river or stream of this State into any other State, for use therein.

"2. It shall be the duty of the governor to keep a general oversight over the fresh-water lakes, ponds, brooks, creeks, rivers and streams of this State and to see that the same are preserved for the use and benefit of the citizens and inhabitants of this State and to prevent the waters thereof from being carried or transported by pipes, conduits, ditches, tunnels or canals into other States for use therein; when it is brought to the attention of the governor that it is the intention of any person, firm, association or corporation to so carry or transport into any other State for

[Interstate Waters]

use therein, the waters of any such fresh-water lake, pond, brook, creek, river or stream of this State, it shall be his duty, through the attorney general of the State to bring such action in the name of the people of the State in the courts of this State or of the United States as may be necessary to prevent such carrying away or transporting of such waters into another State.

"3. This act shall take effect immediately."

This act is entitled "An act to preserve and maintain the lakes, ponds, brooks, creeks, rivers, and streams of this State, and to prevent the waters thereof from being carried by pipes, conduits, ditches, tunnels or canals into other States, for use therein." (Approved March 3, 1911.)

The legislature of 1911 further passed the following joint resolution: "Assembly Joint Resolution No. 8. Relative to Diverting the Waters of the Truckee River from Their Natural Course.

"Whereas, the government of the United States has in contemplation the execution of a contract with the Truckee General Electric Company, by which it is agreed to allow the said company to construct an artificial outlet to Lake Tahoe by driving a tunnel from the Nevada side of said lake to tap the said lake beneath the water level and divert its waters through the State of Nevada; and Whereas, the said lake and the watershed of the same lies most largely in the State of California, and the present natural outlet of said lake is in the State of California, and the Truckee River, through which the overflow and flood waters of said lake flow for a distance of over thirty-five miles through the State of California, is the source of millions of dollars in wealth to this State; and Whereas, the diversion of the waters of said lake from their present course would result in great damage to this State even under the present condition, with the discouraging prospect of much greater loss in the future by surrendering one of its greatest and most valuable water supplies, which carries with it by far the greatest possibilities and probabilities for beneficial use in domestic irrigation and power purposes in this State; and Whereas, the State of California claims to own the major portion of the waters of said lake and protests against the diversion of said waters, and will resist the diversion contemplated, as an invasion of the rights of the people of this State; therefore be it

"Resolved by the assembly and senate jointly, That his excellency, William H. Taft, President of the United States, be and he is hereby most earnestly and respectfully urged not to enter into the contract hereinbefore mentioned, nor to permit such a contract to be executed, nor to allow any change to be made in the outlet of said lake that would result in the diversion of the flood or overflow waters of said lake from their present course."

This resolution was forwarded by the governor to President Taft. The projectors of the enterprise complained of were since reported as abandoning the project.

Text, Part V.

Percolating Waters.—*Statutes of 1877–78, Page 195,* concerning waste of water from artesian wells. Another similar statute was enacted by the legislature in 1907, and follows in full.

Statutes of 1907, Page 122, Chapter 101; amended 1909, Chapter 427.

[Percolating Waters]

"An act to prevent the waste and flow of water from artesian wells, and prescribing penalties therefor, and defining waste and artesian wells." Approved March 6, 1907. (Section 3, amd. 1909, c. 427.)

Section 1. "Any artesian well which is not capped, equipped or furnished with such mechanical appliance as will readily and effectively arrest and prevent the flow of water from such well, is hereby declared to be a public nuisance. The owner, tenant or occupant of the land upon which such well is situated, who causes, permits or suffers such public nuisance, or suffers or permits it to remain or continue, is guilty of a misdemeanor; and any person owning, possessing or occupying any land upon which is situated an artesian well, who causes, suffers, or permits the water to unnecessarily flow from such well, or to go to waste, is guilty of a misdemeanor."

Section 2. "For the purposes of this act, an artesian well is defined to be any artificial hole in the ground through which water naturally flows from subterranean sources to the surface of the ground for any length of time."

Section 3. "Waste is defined, for the purposes of this act, to be the causing, suffering or permitting any water flowing from an artesian well, to run into any river, creek, or other natural watercourse or channel, or into any bay or pond (unless used thereafter for the beneficial purpose of irrigation of land or domestic use), or into any street, road, or highway, or upon the land of any person, or upon the public lands of the United States or of the State of California, unless it be used thereon for the beneficial purposes of the irrigation thereof or for domestic use or the propagation of fish. The use of any water flowing from an artesian well for the irrigation of land whenever over five per cent of the water received on such land for such purposes is allowed to escape therefrom, is also hereby declared to be waste within the meaning of this act; provided, that nothing herein shall prevent the running of artesian water into an artificial pond or storage reservoir, if used thereafter for a beneficial use; provided, such beneficial use shall not exceed one-tenth of one miner's inch of water per acre, perpetual flow, but such user of water shall have the right to cumulate the said amount within any period of each year." (As amended 1909, c. 427.)

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Section 4. "Each day's continuance of such waste shall constitute a new offense under this act."

Section 5. "Any person violating any of the provisions of this act shall, for each offense, upon conviction thereof, be punished by a fine of not less than $25 and not more than $500, or by imprisonment in the county jail for a period of not more than six months, or by both such fine and imprisonment. All prosecutions for the violation of any of the provisions of this act shall be instituted in the justice's court of the county in which such well is situated. Any fine imposed under the provisions of this act may be collected as in other criminal cases, and the justice may also issue an execution upon the judgment therein rendered and the same may be enforced and collected as in civil cases."

Section 6. "All acts and parts of acts in conflict with this act are hereby repealed."

Section 7. "This act shall take effect immediately."

This act has been held constitutional. Ex parte Elam, 6 Cal. App. 233, 91 Pac. 811. See, also, Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748, construing the statute of 1878.

See, also, Statutes of 1909, c. 356, to prevent percolation of water into oil wells; and Statutes of 1911, chapter 309, regulating natural gas wells.

Mineral Waters.—Statutes of 1911, chapter 454, approved April 14, 1911, entitled, "An act regulating the extraction of minerals from the waters of any stream or lake and prohibiting the extraction of minerals from said waters except under lease from or express permission of the State for a period not exceeding twenty-five years." The act reads: "Section 1. Minerals contained in the waters of any stream or lake in this State shall not be extracted from said waters except upon charges, terms and conditions prescribed by law. No person, firm, corporation or association shall hereafter gain the right to extract or cause to be extracted said minerals from said waters by user, custom, prescription, appropriation, littoral rights, riparian rights, or in any manner other than by lease from or express permission of the State as prescribed by law; and no such lease or permission shall be granted for a longer period than twenty-five years.

"Sec. 2. All acts or parts of acts in conflict herewith are hereby repealed.

[Mineral Waters]

"Sec. 3. This act shall take effect immediately."

See, also, Statutes of 1911, chapter 612, providing a licensing system for mineral waters upon State lands.

Text, c. 39.

Navigable Waters.—*Political Code, section 2349 et seq.* See, also, Statutes of 1911, chapter 742, improvement of navigable rivers.

Text, c. 23.

Hydraulic Mining.—*Civil Code, Section 1424. Where Hydraulic Mining can be Carried on.* "The business of hydraulic mining may be carried on within the State of California wherever and whenever the same can be carried on without material injury to the navigable streams, or the lands adjacent thereto." En. Stats. 1893, 337.

Section 1425. Meaning of Hydraulic Mining. "Hydraulic mining, within the meaning of this title, is mining by means of the application of water, under pressure, through a nozzle, against a natural bank." En. Stats. 1893, 337.

Text, cc. 26 and 27.

Eminent Domain.—Code of Civil Procedure, as amended by Statutes of 1911. (Only sections mentioning waters or rights of way are here quoted.)

Section 1238 (as amended by Statutes of 1911, chapter 635. An earlier chapter (251) of the statutes of the same year, also amending this section, is probably superseded by this).

"1238. Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:

. . . . . .

"3. . . . . Ponds, lakes, canals, aqueducts, reservoirs, tunnels, flumes, ditches or pipes for conducting or storing water for the use of any county, incorporated city, or city and county, village or town, or the inhabitants thereof, or for draining any county, incorporated city, or city and county, village or town; raising the banks of streams, removing obstructions therefrom, and widening and deepening or straightening their channels; . . . .

"4. Wharves, docks, piers, chutes, booms, ferries, bridges, toll roads, by-roads, plank, and turnpike roads; paths and roads either on the surface, elevated, or depressed, for the use of bicycles, tricycles, motorcycles and other horseless vehicles, steam, electric, and horse railroads, canals, ditches, dams, poundings, flumes, aqueducts and pipes for irrigation, public transportation, supplying mines and farming neighborhoods with water, and draining and reclaiming lands, and for floating logs and lumber on streams not navigable.

"5. Roads, tunnels, ditches, flumes, pipes and dumping places for working mines; also outlets, natural or

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otherwise, for the flow, deposit, or conduct of tailings or refuse matter from mines; also an occupancy in common by the owners or possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines.

. . . . . .

"12. Canals, reservoirs, dams, ditches, flumes, aqueducts and pipes and outlets natural or otherwise for supplying, storing, and discharging water for the operation of machinery for the purpose of generating and transmitting electricity for the supply of mines, quarries, railroads, tramways, mills, and factories with electric power; and also for the applying of electricity to light or heat mines, quarries, mills, factories, incorporated cities and counties, villages or towns; and also for furnishing electricity for lighting, heating or power purposes to individuals or corporations, together with lands, buildings and all other improvements in or upon which to erect, install, place, use or operate machinery for the purpose of generating and transmitting electricity for any of the purposes or uses above set forth.

"13. Electric power lines, electric heat lines, electric light lines, electric light, heat and power lines, and works or plants, for the generation, transmission or distribution of electricity for the purpose of furnishing or supplying electric light, heat or power to any county, city and county or incorporated city or town, or the inhabitants thereof."

. . . . . .

Section 1239 (as amended in Statutes of 1911, c. 356).

"The following is a classification of the estates and rights in lands subject to be taken for public use:

"1. A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams, and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine.

"2. An easement, when taken for any other use, provided, however, that when the taking is by a municipal corporation, and is for the purpose of constructing, equipping, using, maintaining or operating any works, road, railroad, tramway, power plant, telephone line, or other necessary works or structures, for the preparation, manufacture, handling or transporting of any material or supplies required in the construction or completion by such municipal corporation of any public work, improvement, or utility, a fee simple may be taken if the legislative body of such municipal corporation shall, by resolution, determine the taking thereof to be necessary.

"3. The right of entry upon and occupation of lands, and the right to take therefrom such earth, gravel, stones, trees, and timber as may be necessary for some public use."

Section 1240 (as amended in Statutes of 1911, chapter 358. An earlier chapter (115) of the same year is probably superseded by this).

"The private property which may be taken under this title includes:

"1. All real property belonging to any person;

"2. Lands belonging to this State, including tide and submerged lands, not within the corporate limits of any city, or city and county, or to any county, incorporated city, or city and county, village or town, not appropriated to some public use;

"3. Lands belonging to the United States or owned or held by the United States in trust, or otherwise, for any purpose, except lands owned or held for lighthouses, postoffices or other government buildings, forts, arsenals, or other military purposes;

"4. Property appropriated to public use; but such property shall not be taken unless for a more necessary public use than that to which it has already been appropriated; provided that where any such property has been so appropriated by any individual, firm or private corporation,

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the use thereof for a public street or highway of a municipal corporation, or the use thereof by a municipal corporation for the same public purpose to which it has been so appropriated, shall be deemed more necessary uses than the public use to which such property has been already appropriated; and provided, further, that where property already appropriated to a public use or purpose, by any person, firm or private corporation, is sought to be taken by a municipal corporation, for another public use or purpose, which is consistent with the continuance of the use of such property or some portion thereof for such existing purpose, to the same extent as such property is then used, or to a less or modified extent, then the right to use such property for such proposed public purpose, in common with such other use or purpose, either as then existing, or to a less or modified extent, may be taken by such municipal corporation, and the court may fix the terms and conditions upon which such property may be so taken, and the manner and extent of the use thereof for each of such public purposes, and may order the removal or relocation of any structures or improvements therein or thereon, so far as may be required by such common use.

. . . . . .

"6. All rights of way for any and all the purposes mentioned in section twelve hundred and thirty-eight, and any and all structures and improvements on, over, across or along such rights of way, and the lands held or used in connection therewith shall be subject to be connected with, crossed, or intersected by or embraced within any other right of way or improvements, or structures thereon. They shall also be subject to a limited use, in common with the owner thereof, when necessary; but such uses, crossings, intersections, and connections shall be made in manner most compatible with the greatest public benefit and least private injury:

"No railroad main track crossing, outside the . . . .

"7. All classes of private property not enumerated may be taken for public use, when such taking is authorized by law;

"8. Proceedings to condemn lands belonging to this State are hereby authorized, and must be maintained and conducted in the same manner as are other condemnation proceedings provided for in this title; except, that in such proceedings the summons and a copy of the complaint must be served on the governor, attorney general, and surveyor general of this State;

"9. Proceedings to condemn any of said lands belonging to the United States or owned or held by the United States in trust, or otherwise, for any purpose, are hereby authorized; and must be maintained and conducted in the same manner as are other condemnation proceedings provided for in this title; except, that in such proceedings, the summons and a copy of the complaint must be served on the United States district attorney for the district in which the land sought to be condemned is situated and also upon the United States surveyor general for this State."

Section 1241 (as amended in 1911, chapter 358. An earlier chapter (115) of the same year is probably superseded by this).

"Before property can be taken, it must appear:

"1. That the use to which it is to be applied is a use authorized by law;

"2. That the taking is necessary to such use;

"3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use; provided, that where such property has been so appropriated by any individual, firm or private corporation, the use thereof for a public street or highway of a municipal corporation, or the use thereof by a municipal corporation for the same public purpose to which it has been so appropriated, shall be deemed more necessary uses than the public use to which such property has been already appropriated."

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Section 1247a (added in Statutes of 1911, c. 358).

"The court shall also have power to regulate and determine the place and manner of removing or relocating structures or improvements, or of enjoying the common use mentioned in the fourth subdivision of section twelve hundred and forty."

Section 1248 (as amended in Statutes of 1911, c. 358).

"The court, jury, or referee must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

"1. The value of the property sought to be condemned, and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein; if it consists of different parcels, the value of each parcel and each estate or interest therein shall be separately assessed;

"2. If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff;

"3. Separately, how much the portion not sought to be condemned, and each estate or interest therein, will be benefited, if at all, by the construction of the improvement proposed by the plaintiff; and if the benefit shall be equal to the damages assessed under subdivision two, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value;

"4. If the property sought to be condemned be water or the use of water, belonging to riparian owners, or appurtenant to any lands, how much the lands of the riparian owner, or the lands to which the property sought to be condemned is appurtenant, will be benefited, if at all, by a diversion of water from its natural course, by the construction and maintenance, by the person or corporation in whose favor the right of eminent domain is exercised, of works for the distribution and convenient delivery of water upon said lands; and such benefit, if any, shall be deducted from any damages awarded the owner of such property;

"5. If the property sought to be condemned be for a railroad, the cost of goods and sufficient fences, along the line of such railroad, and the cost of cattle-guards, where fences may cross the line of such railroad;

"6. If the removal or relocation of structures or improvements is sought, the cost of such removal or relocation and the damages, if any, which will accrue by reason thereof;

"7. As far as practicable, compensation must be assessed for each source of damages separately. . . . ."

Statute of 1911, chapter 719, Irrigation a Public Use.

"Section 1. Irrigation in the State of California is hereby declared to be a public necessity and a public use, and the power of eminent domain may be exercised on behalf of such public use in accordance with the provisions of title VII, part III of the Code of Civil Procedure of the State of California. Provided that any person, firm or corporation, exercising the power of eminent domain and in control of water appropriated for sale, rental or distribution, shall not, by this act, be relieved from the duty of furnishing water to irrigate the lands over which any right of way is obtained by condemnation for irrigation purposes as required by an act entitled 'An act to regulate and control the sale, rental and distribution of appropriated water in this State, other than in any city, city and county, or town therein and to secure the rights of way for the conveyance

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of such water to the places of use,' approved March 12, 1885, or any other law now in force in this State.

"Sec. 2. This act shall not repeal or modify an act entitled, 'An act to regulate and control the sale, rental and distribution of appropriated water in this State, other than in any city, city and county, or town therein, and to secure the rights of way for the conveyance of such water to the place of use,' approved March 12, 1885, and other acts supplemental thereto and amendatory thereof, or shall the same be construed to alter or change the law of the State of California as to the duty of any person, firm, or corporation in charge of a public use to furnish water."

Text, Part VII.

Public Service—Water Companies and Consumers—Constitution.

Constitution, Article 14, Section 1. "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law; provided, that the rates or compensation to be collected by any person, company or corporation in this State for the use of water supplied to any city and county or city or town, or the inhabitants thereof, shall be fixed, annually, by the board of supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to such further processes and penalties as the legislature may prescribe. Any person, company or corporation collecting water rates in any city and county, or city or town in this State, otherwise than as so established, shall forfeit the franchises and waterworks of such person, company or corporation to the city and county, or city or town where the same are collected, for the public use."

Article 14, Section 2. "The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be

exercised except by authority of and in the manner prescribed by law."

In 1911 the legislature proposed a constitutional amendment to create a Public Service Commission, by amending section 23 of article 12. Stats. 1911, c. 60, Senate Amendment 47. This requires ratification at the next election. It provides that the commissioners shall be without constitutional restraint. The proposed amendment reads as follows:

"Sec. 23. Every private corporation, and every individual or association of individuals, owning, operating, managing, or controlling any commercial railroad, interurban railroad, street railroad, canal, pipe-line, plant, or equipment, or any part of such railroad, canal, pipe-line, plant or equipment within this state, for the transportation or conveyance of passengers, or express matter, or freight of any kind, including crude oil, or for the transmission of telephone or telegraph messages, or for the production, generation, transmission, delivery or furnishing of heat, light, water or power or for the furnishing of storage or wharfage facilities, either directly or indirectly, to or for the public, and every common carrier, is hereby declared to be a public utility subject to such control and regulation by the railroad commission as may be provided by the legislature, and every class of private corporations, individuals, or associations of individuals hereafter declared by the legislature to be public utilities shall likewise be subject to such control and regulation.

"The railroad commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the state of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the legislature, and the right of the legislature to confer powers upon the railroad commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this constitution.

"From and after the passage by the legislature of laws conferring powers upon the railroad commission respecting public utilities, all powers respecting such public utilities vested in boards of supervisors, or municipal councils, or other governing bodies of the several counties, cities and counties, cities and towns, in this state, or in any commission created by law and existing at the time of the passage of such laws, shall cease so far as such powers shall conflict with the powers so conferred upon the railroad commission; provided, however, that this section shall not affect such powers of control over any public utility vested in any city and county, or incorporated city or town as, at an election to be held pursuant to laws to be passed hereafter by the legislature, a majority of the qualified electors voting thereon of such city and county, or incorporated city or town, shall vote to retain, and until such election such powers shall continue unimpaired; but if the vote so taken shall not favor the continuation of such powers they shall thereafter vest in the railroad commission as provided by law; and provided, further that where any such city and county or incorporated city or town shall have elected to continue any powers respecting public utilities, it may, by vote of a majority of its qualified electors voting thereon, thereafter surrender such powers to the railroad commission in the manner to be prescribed by the legislature; or if such municipal corporation shall have surrendered any powers to the railroad commission, it may, by like vote, thereafter reinvest itself with such power.

"Nothing in this section shall be construed as a limitation upon any

[Public Service—Water Companies and Consumers—Constitution]

power conferred upon the railroad commission by any provision of this constitution now existing or adopted concurrently herewith."

Another proposed amendment (Stats. 1911, c. 67, Senate Amendment, 49), relates to municipal ownership, proposing to amend section 19 of article 11.

Text, Part VII.

Public Service—Civil Code.

Civil Code, Section 548. Corporation may Obtain Contract to Supply City or Town. "No corporation formed to supply any city, city and county, or town with water must do so unless previously authorized by an ordinance of the authorities thereof, or unless it is done in conformity with a contract entered into between the city, city and county, or town and the corporation. Contracts so made are valid and binding in law, but do not take from the city, city and county, or town the right to regulate the rates for water, nor must any exclusive right be granted. No contract or grant must be made for a term exceeding fifty years." En. March 21, 1872.

Civil Code, Section 549. Water Corporations, Duties, etc. "All corporations formed to supply water to cities or towns must furnish pure fresh water to the inhabitants thereof, for family uses, so long as the supply permits, at reasonable rates and without distinction of persons, upon proper demand therefor; and must furnish water to the extent of their means, in case of fire or other great necessity, free of charge. The board of supervisors, or the proper city or town authorities, may prescribe proper rules relating to the delivery of water, not inconsistent with the laws of the State." En. March 21, 1872. Amd. 1873–74, 21; 1905, 580.

Civil Code, Section 551, Construction of Canal, etc. "No canal, flume, or other appliance for the conducting of water must be so laid, constructed, or maintained as to obstruct any public highway; and every person or corporation owning, maintaining, operating or using any such canal, flume, or appliance, crossing or running along any public highway, must construct, maintain, and keep in repair such bridges across the same as may be necessary to the safe and convenient use of such highway by the public; and on failure so to do, the board of supervisors of the county, after seven days' notice in writing to said person or corporation, may construct or repair such bridge or bridges, and recover of such person

[Public Service—Civil Code]

or corporation the amount of the expenditure made in so doing." En. March 21, 1872. Amd. 1905, 580.

Civil Code, Section 552. Right of Purchaser to Use Water for Irrigating. "Whenever any corporation, organized under the laws of this State, furnishes water to irrigate lands which said corporation has sold, the right to the flow and use of said water is and shall remain a perpetual easement to the land so sold, at such rates and terms as may be established by said corporation in pursuance of law. And whenever any person who is cultivating land, on the line and within the flow of any ditch owned by such corporation, has been furnished water by it, with which to irrigate his land, such person shall be entitled to the continued use of said water, upon the same terms as those who have purchased their land of the corporation." En. Stats. 1875–76, 77.

Text, Part VII.

Public Service—General Statutes.

Statute of 1880, Page 16. Distribution for Irrigation.

"An act authorizing the boards of supervisors of the counties in which water is sold for the purpose of irrigation to fix the rates at which water shall be sold." (Approved March 26, 1880; Stats. 1880, p. 16 [Ban. Ed. 59].)

Section 1. Supervisors to Fix Rates. "The boards of supervisors of the several counties of this State in which water is appropriated, furnished, and sold principally for the purpose of irrigation are hereby authorized and required to fix the maximum rates at which such water shall be furnished and sold, at a meeting to be held in the month of February of each year; provided, that in the year eighteen hundred and eighty such rates shall be fixed at the first meeting after the passage of this act. The rates so fixed and established shall be in force from and after the first day of July, after the date of fixing said rates, and shall continue in force for the period of one year; provided, that nothing in this section shall apply to water furnished within the limits of any incorporated city and county, city, or town."

Section 2. Forfeiture of Franchise. "Any person, company, or corporation collecting rates for water furnished for irrigation in any county in this State in excess of the rates as provided in section one of this act shall forfeit for the public use the franchise

[Public Service—General Statutes—Statute of 1880]

and waterworks of such person, company, or corporation to the county in which such excessive rates were charged."

Section 3. Action to Enforce Forfeiture. "Upon affidavit being made by any interested party, setting forth that any such company, person, or corporation has charged rates for water furnished for irrigating purposes in excess of the rates established by the board of supervisors, the said board of supervisors shall cause the district attorney to commence an action in the superior court of the county, within thirty days from the receipt by them of such affidavit, to enforce the forfeiture of the franchise and waterworks of such person, company, or corporation."

Section 4. To Compel the Performance of the Duties of Supervisors. "If the board of supervisors fail or neglect to fix the rates, as provided in section one of this act, or if the board of supervisors fail or neglect to commence the action provided for in section three of this act, as therein provided, any interested person may commence proceedings to compel the performance of such duties."

Section 5. Control of Use of Water Prohibited. "No person, company, or corporation selling water for irrigation shall be permitted to exercise any control as to the use of the water after its delivery to the purchaser."

Section 6. "This act shall take effect immediately."

Statute of 1885, Page 95. General Distribution.

"An act to regulate and control the sale, rental, and distribution of appropriated water in this State, other than in any city, city and county, or town therein, and to secure the rights of way for the conveyance of such water to the places of use." (Approved March 12, 1885; 1885, 95; 1897, 49; 1901, 80.)

Section 1. Use of Appropriated Water Public. "The use of all water now appropriated, or that may hereafter be appropriated, for irrigation, sale, rental, or distribution, is a public use, and the right to collect rates or compensation for use of such water is a franchise, and except when so furnished to any city, city and county, or town, or the inhabitants thereof, shall be regulated and controlled in the counties of this State by the several boards of supervisors thereof, in the manner prescribed in this act."

Section 2. Supervisors may Fix Rates. "The several boards of supervisors of this State, on petition and notice as provided in sec-

[Public Service—General Statutes—Statute of 1885]

tion three of this act, are hereby authorized and required to fix and regulate the maximum rates at which any person, company, association, or corporation, having or to have appropriated water for sale, rental, or distribution in each of such counties, may and shall sell, rent, or distribute the same."

Section 3. Petition for Fixing Rates. "Whenever a petition of not less than twenty-five inhabitants, who are taxpayers of any county of this State, shall, in writing, petition the board of supervisors thereof, to be filed with the clerk of said board, to regulate and control the rates and compensation to be collected by any person, company, association, corporation, for the sale, rental, or distribution of any appropriated water, to any of the inhabitants of such county, and shall in such petition specify the persons, companies, associations, or corporations, or any one or more of them whose water rates are therein petitioned to be regulated or controlled, the clerk of such board shall immediately cause such petition, together with a notice of the time and place of hearing thereof, to be published in one or more newspapers published in such county; and if no newspaper be published therein, then shall cause copies of such petition and notice to be posted in not less than three public places in such counties and such publication and notice shall be for not less than four weeks next before the hearing of said petition by said board; such notice to be attached to said petition shall specify a day of the next regular term of the session of the said board not less than thirty days after the first publication or posting thereof, for the hearing of said petition, which shall impart notice to all such persons, companies, associations, and corporations mentioned in such petition, and all persons interested in the matters of such petition and notice. Such board may also cause citations to issue to any person or persons within such county to attend and give evidence at the hearing of such petition, and may compel such attendance by attachment."

Section 4. Hearing of Petition—Value of Waterworks. "At the hearing of said petition the board of supervisors shall estimate, as near as may be, the value of the canals, ditches, flumes, water-chutes, and all other property actually used and useful to the appropriation and furnishing of such water, belonging to and possessed by each person, association, company, or corporation, whose franchise shall be so regulated and controlled; and shall in like

[Public Service—General Statutes—Statute of 1885]

manner estimate as to each of such persons, companies, associations, and corporations, their annual reasonable expenses, including the cost of repairs, management, and operating such works; and, for the purpose of such ascertainment, may require the attendance of persons to give evidence, and the production of papers, books, and accounts, and may compel the attendance of such persons and the production of papers, books, and accounts, by attachments, if within their respective counties."

Section 5. Rules to be Observed in Fixing Rates. "In the regulation and control of such water rates for each of such persons, companies, associations, and corporations, such board of supervisors may establish different rates at which water may and shall be sold, rented, or distributed, as the case may be; and may also establish different rates and compensation for such water so to be furnished for the several different uses, such as mining, irrigating, mechanical, manufacturing, and domestic, for which such water shall be supplied to such inhabitants, but such rates as to each class shall be equal and uniform. Said board of supervisors, in fixing such rates, shall, as near as may be, so adjust them that the net annual receipts and profits thereof to the said persons, companies, associations, and corporations so furnishing such water to such inhabitants shall be not less than six nor more than eighteen per cent upon said value of the canals, ditches, flumes, chutes, and all other property actually used and useful to the appropriation and furnishing of such water of each of such persons, companies, associations, and corporations; but in estimating such net receipts and profits, the cost of any extensions, enlargements, or other permanent improvements of such water-rights or waterworks shall not be included as part of the said expenses of management, repairs, and operating of such works, but when accomplished, may and shall be included in the present cost and cash value of such work. In fixing said rates, within the limits aforesaid, at which water shall be so furnished as to each of such persons, companies, associations, and corporations, each of said board of supervisors may likewise take into estimation any and all other facts, circumstances, and conditions pertinent thereto, to the end and purpose that said rates shall be equal, reasonable and just, both to such persons, companies, associations, and corporations, and to said inhabitants; and each such board of supervisors shall designate what

[Public Service—General Statutes—Statute of 1885]

proportion of the rates so fixed shall be for the said annual reasonable expenses of each of such persons, companies, associations or corporations, and what proportion of the rates so fixed shall be for the said net annual receipts and profits to such persons, companies, associations, or corporations. The said rates, when so fixed by such board, shall be binding and conclusive for not less than one year next after their establishment, and until established anew or abrogated by such board of supervisors, as hereinafter provided. And until such rates shall be so established or after they shall have been abrogated by such board of supervisors, as in this act provided, the actual rates established and collected by each of the persons, companies, associations, and corporations now furnishing, or that shall hereafter furnish, appropriated waters for sale, rental, or distribution to the inhabitants of any of the counties of this State, shall be deemed and accepted as the legally established rates thereof." (Amendment approved February 28, 1901; Stats. 1901, p. 80.)

Section 6. Changing Rates. "At any time after the establishment of such water rates by any board of supervisors of this State, the same may be established anew, or abrogated in whole or in part by such board, to take effect not less than one year next after such first establishment, but subject to said limitation of one year, to take effect immediately in the following manner: Upon the written petition of inhabitants as hereinbefore provided, or upon the written petition of any of the persons, companies, associations or corporations, the rates and compensations of whose appropriated waters have already been fixed and regulated, and are still subject to such regulation by any such board of supervisors of this State, as in this act provided; and upon the like publication or posting of such petition and notice, and for the like period of time as hereinbefore provided, such board of supervisors shall proceed anew, in the manner hereinbefore provided, to fix and establish the water rates for such person, company, association or corporation, or any number of them, in the same manner as if such rates had not been previously established, and may, upon petition of such inhabitants, but not otherwise, abrogate any and all existing rates theretofore established by such board. All water rates, when fixed and established as herein provided, shall be in force and effect until established anew or abrogated, as provided in this act."

[Public Service—General Statutes—Statute of 1885]

Section 7. Record of Rates to be Published. "Each board of supervisors of this State, when fixing and establishing, or fixing and establishing anew, or abolishing any previously established water rates, as hereinbefore provided, shall cause a record to be made thereof in the records of such board, and cause the same to be published or posted in the manner and for the time required for the publication or posting of said petitions and notices."

Section 8. Water to be Furnished at Rates Fixed. "Any and all persons, companies, associations, or corporations, furnishing for sale, rental, or distribution, any appropriated waters to the inhabitants of any county or counties of this State (other than to the inhabitants of any city, city and county, or town, therein), shall so sell, rent, or distribute such waters at rates not exceeding the established rates fixed and regulated therefor by the boards of supervisors of such counties, or as fixed and established by such person, company, association, or corporation, as provided in this act."

Section 9. Penalty for Excessive Charges. "If any person, company, association, or corporation, whose water rates for any county of this State have been fixed and regulated by a board of supervisors, as in this act provided, and while such rates are in force, shall collect for any appropriated water, furnished to any inhabitant of such county water rates in excess of such established rates, shall be liable, in an action by any such inhabitant so aggrieved, to a recovery of the whole rate so collected, together with actual damages sustained by such inhabitant, with costs of suit."

Section 10. To Sell to All Persons. "Every person, company, association, and corporation, having in any county in the State (other than in any city, city and county, or town therein) appropriated waters for sale, rental, or distribution, to the inhabitants of such county, upon demand therefor, and tender in money of such established water rates, shall be obligated to sell, rent or distribute such water to such inhabitants at the established rates regulated and fixed therefor, as in this act provided, whether so fixed by the board of supervisors or otherwise, to the extent of the actual supply of such appropriated waters of such person, company, association or corporation, for such purposes. If any person, company, association or corporations, having water for such use, shall refuse compliance with such demand, or shall neg-

[Public Service—General Statutes—Statute of 1885]

lect, for the period of five days after such demand to comply therewith to the extent of his or its reasonable ability so to do, shall be liable in damages to the extent of the actual injury sustained by the person or party making such demand and tender, to be recovered, with costs."

Section 11. Condemning Land for Right of Way. "Whenever any person, company, association or corporation shall have acquired the right to appropriate water, or shall have acquired the right to appropriate such water in this State, such person, company, association, or corporation, may proceed to condemn the land and premises necessary to such right of way, under the provisions of title VII of part III of the Code of Civil Procedure of this State, and amendments made and to be made thereto, and all the provisions of said code, so far as the same can be made applicable, relating to the condemnation and taking of property for the public uses, shall be applicable to the provisions of this act."

Section 11½. Contracts in Existence, How Affected. "Nothing in this act contained shall be construed to prohibit or invalidate any contract already made, or which shall hereafter be made, by or with any of the persons, companies, associations, or corporations described in section two of this act, relating to the sale, rental or distribution of water, or to the sale or rental of easements and servitudes of the right to the flow and use of water; nor to prohibit or interfere with the vesting of rights under any such contract." (New section added March 2, 1897; Stats. 1897, 49.)

Section 12. "This act shall take effect and be in force from and after its passage."

Statute of 1901, Page 331. Contracts for Service.

"An act declaring upon what terms contracts between persons, companies, associations, or corporations furnishing water for irrigation to the consumers of such water shall be valid, and to provide that such contracts shall be deemed based upon sufficient consideration." (Approved March 16, 1901. Stats. 1901, p. 331.)

Section 1. "It is and shall be lawful for any person, company, association, or corporation, furnishing for sale, rental, or distribution any appropriated waters for purposes of irrigation, to enter into contracts with individual consumers of such water or with bodies of such consumers, relating to the sale, rental, or distribution of such water, or any thereof, which contracts, subject to the

[Public Service—General Statutes—Statute of 1901]

restrictions hereinafter declared, shall be valid to all intents and purposes, any law or rule to the contrary notwithstanding."

Section 2. "No such contract shall provide for the sale, rental, or distribution of any such water at any rate exceeding the established rates fixed and regulated therefor by the board of supervisors of the proper counties, or fixed and established by such person, company, association, or corporation, as provided by law."

Section 3. "Nothing in this act contained shall be construed to authorize or make valid any contract not made for a valuable consideration; but an agreement on the part of such person, company, association, or corporation to sell, rent, or distribute any water to a consumer, without payment in advance therefor, or upon any other terms to which such consumer is not otherwise lawfully entitled, shall be deemed and taken to be a valuable and sufficient consideration for such contract."

Section 4. "Nothing in this act contained shall affect any contract made prior to the time that the board of supervisors fix and establish the rates and regulations for and under which water shall be sold and supplied."

Section 5. "This act shall take effect and be in force from and after its passage."

Text, § 1266 et seq.

Mutual Companies.—*Civil Code, Section 324. Stock in Irrigation Companies.* "Whenever the capital stock of any corporation is divided into shares and certificates therefor are issued, such shares of stock, except as hereinafter provided, are personal property, and may be transferred by indorsement by signature of the proprietor, his agent, attorney, or legal representative, and the delivery of the certificate; but such transfer is not valid, except as to the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties by whom and to whom transferred, the number of the certificate, the number or designation of the shares, and the date of the transfer; provided, however, that any corporation organized for, or engaged in the business of selling, distributing, supplying, or delivering water for irrigation purposes or for domestic use, may in its by-laws provide that water shall only be so sold, distributed, supplied, or delivered to owners of its capital stock, and that such stock shall be appurtenant to certain lands when the same are described in

[Mutual Companies]
the certificate issued therefor; and when such certificate shall be so issued, and a certified copy of such by-law recorded in the office of the county recorder in the county where such lands are situated, the shares of stock so located on any land shall only be transferred with said lands, and shall pass as an appurtenance thereto. Whenever any officer of any corporation shall refuse to make entries upon the books thereof, or to transfer stock therein, or to issue a certificate or certificates therefor to the transferee as provided by this and the next preceding section, such officer shall be subject to a penalty of four hundred dollars, to be recovered as liquidated damages, in an action brought against him by the person aggrieved."

Civil Code, Section 309. Dividing Water-rights Among Stockholders. " . . . . Where a corporation has been heretofore or may hereafter be formed for the purpose, among other things, of acquiring, holding and selling real estate, water, and water-rights, the directors of such corporation may, with the consent of stockholders representing two-thirds of the capital stock thereof, given at a meeting called for that purpose, divide among the stockholders the land, water or water-rights so by such corporation held, in the proportions to which their holdings of such stock at the time of such division entitle them."

Municipal Ownership.—*Statutes of 1907, Chapter 321.* "*An act authorizing any incorporated city, town or municipal corporation, to construct, equip, use, maintain and operate any works, road, railroad, tramway, power plant, telephone or telegraph line, or other necessary works or structures, for the preparation, manufacturing, handling or transporting of materials or supplies required in the construction or completion of any public work, improvement or utility, and to lease, acquire, by purchase, condemnation or otherwise, and hold and use lands and other necessary property for said purposes.*" *(Approved March 18, 1907.)*

Section 1. "Any incorporated city, town or municipal corporation in this State is hereby authorized to construct, equip, use, maintain and operate any works, road, railroad, tramway, power plant, telephone or telegraph line, or other necessary works or structures, within or without such city, town or municipal corporation, or the county wherein such city, town or municipal corpo-

[Municipal Ownership]

ration is located, for the preparation, manufacturing, handling or transporting of any materials or supplies required in the construction or completion by such city, town or municipal corporation of any public work, improvement or utility, and, for the purpose of constructing, equipping, using, maintaining or operating any such works, road, railroad, tramway, power plant, telephone or telegraph line, or other necessary works or structures, such city, town or municipal corporation is hereby authorized to lease or acquire, by purchase, condemnation or otherwise, and hold and use, any land, rights of way, water, water-rights, quarry, gravel bed or other mineral deposits, or any other necessary property, within or without such city, town, or municipal corporation, or the county wherein such city, town or municipal corporation is located."

Section 2. "Nothing in this act contained shall be construed as extending or enlarging any limitation prescribed by law or municipal charter upon taxation, expenditure of public funds, or the incurring of indebtedness, by any city, town or municipal corporation."

Section 3. "This act shall take effect immediately."

Statutes of 1909, Chapter 352. "An act granting to municipal corporations of the State of California, rights of way over public lands of the State for the location, construction and maintenance of waterworks and power plants; and the right to take material from such lands for the construction of such works and to take any waters belonging to the State for the purpose of supplying any such municipality and its inhabitants with water."

See, also, Statutes of 1911, 426. as to municipal rights of way; and Statutes of 1911, chapter 429, authorizing municipal corporations to supply outside lands.

Text, c. 58.

Irrigation District Statutes.—The first legislation in this line was the Statute of 1871–72, p. 945. This is probably repealed by the act of 1897. (See Gen. Laws, p. 498.) The first elaborate act for the formation of irrigation districts was the Wright Act of 1887, p. 29. All previous acts were repealed by the act of 1897, p. 254. (Gen. Laws, p. 498.) The present law is briefly as follows:

[Irrigation District Statutes]

Act 1897, pp. 254, 394. Amd. 1901, p. 815. Supplemented 1903, p. 3. Amd. 1905, c. 33. Amd. 1907, c. 298. Amd. 1909, cc. 22, 55, 91, 274, 284, 303, 660, 692, 698; 1911, cc. 317, 588, and others below noted.

Purpose. To allow organization by owners of land susceptible of one system of irrigation.

Proceedings to Organize. Petition by owners of majority in value of lands to board of supervisors; accompanied by a bond in double amount of probable cost of organization; published. (Sec. 2. Amd. 1909, c. 22.) Hearing before supervisors, with right of objectors to appeal to superior court. Five subdivisions formed by order of supervisors, one director to be elected by each subdivision.

Election held to obtain final assent of owners and to elect officers. Supervisors declare the district duly organized, if carried, and copy of this order recorded.

Officers. Board of five (or in some cases, three) directors, assessor, tax collector, treasurer.

Directors. (See Amd. 1909, cc. 660, 692.) Classified by length of tenure (some two, some four years; sec. 20). Must meet monthly. Records open for inspection. Must publish annual reports. Control and carry on the irrigation works. Powers enumerated in detail. Director must be a resident and freeholder of the district.

Property. District may acquire water-rights by condemnation or purchase. (Sec. 15.) Title to property is in the district in trust. (Sec. 15.) The district is given all waters belonging to the State within the district. (Secs. 53–56.) Has right of way for canals, etc., but otherwise must not interfere with navigation or mining (sec. 64) or with existing vested rights. (Sec. 65.) Directors may sell unnecessary property. (Amd. 1909, c. 698.) Concerning water-power rights of districts, see Stats. 1911, cc. 406 and 407.

Operations. Controlled by directors, who may establish by-laws and regulations, to be printed and distributed. Is in public service. Water shall be apportioned in proportion to the money last assessed to owner for district purposes. In time of scarcity, water apportioned between districts by a board of water commissioners consisting of the chairmen of the boards of directors of all districts

[Irrigation District Statutes]

affected. (Sec. 62.) May contract for construction work. (Secs. 53–56.) May lease the works. Must advertise for bids. Lease must not be for longer than twenty-five years. Forfeited for nonpayment of rent for ninety days. (Sec. 100.) See, also, Stats. 1893, p. 295.

Election. (Secs. 19–28. See Amd. 1909, c. 692.) Every two years. Vacancies filled by board of directors. Detailed provisions governing elections.

Bonds. May issue bonds. (Sec. 30.) First submitted at an election. Issued in ten series. May assess to pay interest and principal. Bonds may be redeemed. (Sec. 52.) Validity of bonds and organization may be tested and confirmed in suit in superior court, on behalf of district or individual, and has the effect of a proceeding *in rem*, summons being published. (Sec. 68.) Bonded debt may be reduced. Must be balloted on. Must have consent of bondholders to take up outstanding bonds. (Sec. 98 et seq.) See Stats. 1891, p. 53. Regarding cancellation of bonds, see Stats. 1911, c. 750.

Assessments. (See Amd. 1909, cc. 55, 303.) All real property may be assessed to raise funds. (Sec. 33.) If voted at polls, assessor must perform duties. (Prescribed in detail.) Directors act as board of equalization. After property duly assessed, directors must levy the assessment. County officials may act if district officials refuse to assess and levy when needed. The assessment is a lien on the property assessed. Delinquent notice, delinquent sale, and redemption after sale provided for in detail. Redemption must be within twelve months.

Inclusion and Exclusion of Land After Organization. Land may be excluded. Consent of bondholders or decree of court required. If excluded, is released from liens thereon. (Secs. 74–78.) Land may be included. Petition. Ballot. (Sec. 85 et seq.)

Saving Clauses. Not affect navigation or mining except to give right of way for canals, etc. (Sec. 64.) Not affect existing rights. (Sec. 65.) Not affect existing districts. (Sec. 109.)

Dissolution. (Stats. 1903, p. 3. Amd. 1909, c. 91.) Petition to board of directors. Statement made of assets and indebtedness and plan of settlement. Election thereon, which must be carried by two-thirds vote. Directors then petition superior court. Sum-

[Irrigation District Statutes]

mons published. Has effect of a proceeding *in rem*. Corporation under general laws may take over the property. Decree rendered settling rights of creditors. When all settled the court shall enter a final decree declaring district dissolved.

Drainage. Districts may provide for drainage. Stats. 1907, c. 298.

Validation. "Turlock Irrigation District, as formed by the board of supervisors of Stanislaus county, State of California, and as now existing is hereby recognized and declared valid, and all proceedings on organization and formation are hereby approved, and declared valid." Stats. 1911, c. 95. Similar acts were passed in 1911 for Oakdale (c. 96), Modesto (c. 97), and San Joaquin (c. 98) irrigation districts.

Statutes for the formation of irrigation districts based on the original Wright Act are in force in most of the Western States.

Text, c. 58.

Reclamation Districts.—The law relating to districts for the reclamation of swamp lands is found in sections 3446 to 3493½, inclusive, of the Political Code. It is provided that, after the original works of reclamation are completed, if they are of such a nature that other work must be done continuously, or from year to year, to maintain them or to make them effective, other assessments may be made upon the lands of the district, from time to time, to obtain funds for that purpose. (Sec. 3459.) The trustees must for that purpose make a statement of the work to be done and of its estimated cost. The cost is to be assessed to the lands in proportion to the benefits which it is believed will be caused by the work. The list of assessments is to be filed with the treasurer of the county (sec. 3462), the several amounts assessed become liens upon the respective tracts of land upon which they are assessed (sec. 3463), payment thereof may be made at any time within thirty days (sec. 3465), and if not so paid they become delinquent and may be called for in installments by the board of trustees, and if any installment is not paid in twenty days after such call, a suit for the foreclosure of the lien to that amount, or to the whole amount of the assessment if the trustees so elect, may then be instituted by the district (sec. 3466). Numerous amendments were made in 1911.

[Reclamation Districts]

See Swamp etc. Dist. No. 341 v. Blumenberg (1909), 156 Cal. 532, 539, 106 Pac. 389, 392. See, also, Stats. 1911, c. 365, amending the reclamation district statutes; Stats. 1907, p. 16, and Stats. 1911, c. 139, for formation of levee districts; Stats. 1911, c. 266, for formation of protection districts to protect banks and channels of streams from storms; Stats. 1911, c. 637, levee districts; Stats. 1911, c. 718, overflow districts.

Text, § 641 et seq.

Injunctions.—*Code of Civil Procedure, Section 530.* "In all actions which may be hereafter brought when an injunction or restraining order may be applied for to prevent the diversion, diminution or increase of the flow of water in its natural channels, to the ordinary flow of which the plaintiff claims to be entitled, the court shall first require due notice of the application to be served upon the defendant, unless it shall appear from the verified complaint or affidavits upon which the application therefor is made, that, within ten days prior to the time of such application, the plaintiff has been in the peaceable possession of the flow of such water, and that, within such time, said plaintiff has been deprived of the flow thereof by the wrongful diversion of such flow by the defendant, or that the plaintiff, at the time of such application, is, and for ten days prior thereto has been, in possession of the flow of said water, and that the defendant threatens to divert the flow of such water; and if such notice of such application be given and upon the hearing thereof, it be made to appear to the court that plaintiff is entitled to the injunction, but that the issuance thereof pending the litigation will entail great damage upon defendant, and that plaintiff will not be greatly damaged by the acts complained of pending the litigation, and can be fully compensated for such damage as he may suffer, the court may refuse the injunction upon the defendant giving a bond such as is provided for in section five hundred and thirty-two; and upon the trial the same proceedings shall be had, and with the same effect as in said section provided." As amended by Stats. 1911, c. 733.

Code of Civil Procedure, Section 532. " . . . . In all actions pending, or which may hereafter be brought, when an injunction or restraining order has been or may be granted or applied for, to prevent the diversion pending the litigation, of water used or to be used for irrigation or domestic purposes only, if it be made to appear to the court that great damage will be suffered by the person enjoined, in case the injunction is continued, and that the person in whose behalf it issued can be fully compensated for any

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damages he may suffer by reason of the continuance of the acts enjoined during the pendency of the litigation, the court in its discretion may dissolve or modify the injunction, upon the person enjoined giving a bond with sureties to be approved by the judge, and in such amounts as may be fixed by the court or judge, conditioned that such enjoined person will pay all damages which the person in whose behalf the injunction issued may suffer by reason of the continuance, during the litigation, of the acts complained of. Upon the trial the amount of such damages must be ascertained, and in case judgment is rendered for the person in whose behalf the injunction was granted, the amount fixed as such damages must be included in the judgment, together with reasonable attorney's fees. In any suit brought on the bond, the amount of such damages as fixed in said judgment is conclusive on the sureties." En. March 11, 1872. Amd. 1887, 241. Amd. 1907, 342.

Preliminary Injunctions.—Code of Civil Procedure, section 527, as amended by Statutes of 1911, chapter 42, reads: "An injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits if the complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefor. A copy of the complaint or of the affidavits, upon which the injunction was granted, must, if not previously served, be served therewith. No preliminary injunction shall be granted without notice to the opposite party; nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall appear from facts shown by affidavit or by the verified complaint that great or irreparable injury would result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency above specified, the matter shall be made returnable on an order requiring cause to be shown why the injunction should not be granted, on the earliest day that the business of the court will admit of, but not later than ten days from the date of such order. When the matter first comes up for hearing the party who obtained the temporary restraining order must be ready to proceed and must have served upon the opposite party at least two days prior to such hearing, a copy of the complaint and of all affidavits to be used in such application and a copy of his points and authorities in support of such application; if he be not ready, or if he shall fail to serve a copy of his complaint, affidavits and points and authorities, as herein required, the court shall dissolve the temporary restraining order. The defendant, however, shall be entitled, as of course, to one continuance for a reasonable period, if he desire it, to enable him to meet the application for the preliminary injunction. The defendant may, in response to such order to show cause, present affidavits relating to the granting of the preliminary injunction, and if such affidavits are served on the applicant at least two days prior to the hearing, the applicant shall not be entitled to any continuance on account thereof. On the day upon which such order is made returnable, such hearing shall take precedence of all other matters on the calendar of said day, except older matters of the same character, and matters to which special precedence

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may be given by law. When the cause is at issue it shall be set for trial at the earliest possible date and shall take precedence of all other cases, except older matters of the same character, and matters to which special precedence may be given by law."

Text, § 658.

Penal Statutes.—There are a number of sections of the Penal Code containing criminal provisions respecting waters. These are here quoted.

Penal Code, Section 347. Willfully Poisoning Food, Medicine, or Water. "Every person who willfully mingles any poison with any food, drink, or medicine, with intent that the same shall be taken by any human being, to his injury, and every person who willfully poisons any spring, well, or reservoir of water, is punishable by imprisonment in the State prison for a term not less than one nor more than ten years." En. February 14, 1872.

Penal Code, Section 374. Putting Dead Animals in Streets, Rivers, etc. "Every person who puts the carcass of any dead animal, or the offal from any slaughter-pen, corral, or butcher-shop, into any river, creek, pond, reservoir, stream, street, alley, public highway or road in common use, or who attempts to destroy the same by fire within one-fourth of a mile of any city, town, or village, except it be in a crematory, the construction and operation of which is satisfactory to the board of health of such city, town, or village; and any person who puts any water-closet or privy, or the carcass of any dead animal, or any offal of any kind, in or upon the borders of any stream, pond, lake or reservoir from which water is drawn for the supply of any portion, of the inhabitants of this State, so that the drainage of such water-closet, privy, carcass, or offal may be taken up by or in such stream, pond, lake, or reservoir; or who allows any water-closet, or privy, or carcass of any dead animal, or any offal of any kind, to remain in or upon the borders of any such stream, pond, lake, or reservoir within the boundaries of any land owned or occupied by him, so that the drainage from any such water-closet, privy, carcass, or offal may be taken up by or in such stream, pond, lake, or reservoir; or who keeps any horses, mules, cattle, swine, sheep, or livestock of any kind, penned, corralled, or housed on, over, or on the borders of any such stream, pond, lake, or reservoir, so that the waters thereof become polluted by reason thereof; or who bathes in any such stream, pond, lake, or reservoir; or who by any other means fouls or pollutes the waters of any such stream, pond, lake, or reservoir, is guilty of a misdemeanor, and upon conviction thereof shall be punished as prescribed in section three hundred and seventy-seven." En. February 14, 1872. Amd. 1875–76, 111; 1893, 66; 1905, 767; Amd. 1907, 73.

Penal Code, Section 420. Preventing Person from Entering upon Public Lands. "Every person who unlawfully prevents, hinders, or obstructs any person from peaceably entering upon or establishing a settlement or residence on any tract of public land of the United States within the State of California, subject to settlement or entry under any of the public land laws of the United States; or who unlawfully hinders, prevents or obstructs free passage over or through the public lands of the United States within the State of California, for the purpose of entry, settlement, or residence, as aforesaid, is guilty of a misdemeanor." En. Stats. 1877–78, 117; Rep. Stats. 1880, 1; En. Stats. 1905, 675.

Penal Code, Section 499. Stealing Water. "Every person who, with intent to injure or defraud, connects or causes to be connected, any pipe, tube, or other instrument, with any main, service-pipe, or other pipe, or conduit or flume for conducting water, for the purpose of taking water from such main, service-pipe,

[Penal Statutes]

conduit or flume, without the knowledge of the owner thereof, and with intent to evade payment thereof is guilty of a misdemeanor." En. February 14, 1872.

Penal Code, Section 592. Taking Water from or Obstructing Canals. "Every person who shall without authority of the owner or managing agent, and with intent to defraud, take water from any canal, ditch, flume, or reservoir, used for the purpose of holding or conveying water for manufacturing, agricultural, mining, irrigating or generation of power or domestic uses, or who shall, without like authority, raise, lower, or otherwise disturb any gate or other apparatus thereof, used for the control or measurement of water, or who shall empty or place, or cause to be emptied or placed, into any such canal, ditch, flume, or reservoir, any rubbish, filth, or obstruction to the free flow of the water, is guilty of a misdemeanor." En. 1877–78. Amd. 1899, 146.

Penal Code, Section 607. Destroying or Injuring Bridges, Dams, etc. "Every person who willfully and maliciously cuts, breaks, injures, or destroys any bridge, dam, canal, flume, aqueduct, levee, embankment, reservoir, or other structure erected to create hydraulic power, or to drain or reclaim any swamp and overflowed tide or marsh land, or to store or conduct water for mining, manufacturing, reclamation, or agricultural purposes, or for the supply of the inhabitants of any city or town, or any embankment necessary to the same, or either of them, or willfully or maliciously makes, or causes to be made, any aperture in such dam, canal, flume, aqueduct, reservoir, embankment, levee, or structure, with intent to injure or destroy the same; or draws up, cuts, or injures any piles fixed in the ground for the purpose of securing any sea-bank, or seawall, or any dock, quay, or jetty, lock, or seawall; or who, between the first day of October and the fifteenth day of April of each year, plows up or loosens the soil in the bed or on the sides of any natural watercourse or channel, without removing such soil within twenty-four hours from such watercourse or channel; or who, between the fifteenth day of April and the first day of October of each year, shall plow up or loosen the soil in the bed or on the sides of such natural watercourse or channel, and shall not remove therefrom the soil so plowed up or loosened before the first day of October next thereafter, is guilty of a misdemeanor, and upon conviction, punishable by a fine not less than one hundred dollars and not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding two years, or by both; provided, that nothing in this section shall be construed so as to in any manner prohibit any person from digging or removing soil from any such watercourse or channel, for the purpose of mining." En. February 14, 1872. Amd. 1880, 36.

Penal Code, Sections 624, 625. Regarding water-rights in cities.

Penal Code, Section 629. Screen Over Mill-race, Pipe, etc.; Penalty; Disposition of Fines. "Any person, company, or corporation, owning, in whole or in part, or leasing, operating or having in charge any mill-race, irrigating ditch, pipe, flume, or canal, taking or receiving its waters from any river, creek, stream, or lake in which fish have been placed, or may exist, shall put, or cause to be placed and maintained, over the inlet of such pipe, flume, ditch, canal, or mill-race, a screen of such construction and fineness, strength and quality as shall prevent any such fish from entering such ditch, pipe, flume, canal, or mill-race, when required to do so by the State board of fish commissioners. Any person, company, or corporation violating any of the provisions of this section, or who shall neglect or refuse to put up or maintain such screen, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than twenty dollars or imprisoned in the county jail of the county in which the conviction shall be had not less than ten days, or by both such fine and imprisonment; and all fines imposed and collected for violation of any of the provisions of this section shall be paid

[Penal Statutes]

into the State treasury to the credit of the 'Fish Commission Fund'; provided, that the continuance from day to day of the neglect or refusal, after notification in writing by the State board of fish commissioners, shall constitute a separate offense for each day." En. February 14, 1872. Rep. 1883, 82. En. Stats. 1895, 260. Amd. 1903, 24; 1905, 187.

Public Health Act.—Statutes of 1907, chapter 492; amended by Statutes of 1911, chapter 339 (amending sections 2, 3, 13 and 21). This act makes it unlawful to pollute waters in ways dangerous to health. The act as amended is too long to be reprinted here.

Miscellaneous.—Without further attempt at classification, a few other statutory provisions are appended.

Political Code, sec. 2737, ditches on highways. Political Code, sec. 4042 (En. 1907, p. 372), improvement by counties of innavigable streams. Political Code, sec. 4043 (En. 1907, p. 373), protection of roads from storms. See, also, Stats. 1911, c. 266.

Taxation. Political Code, Section 3663. Assessment of Water Ditches, Toll Roads and Telegraph Lines. "Water ditches constructed for mining, manufacturing or irrigating purposes, and wagon and turnpike toll roads must be assessed the same as real estate by the assessor of the county, at a rate per mile for that portion of such property as lies within his county." (Text, *supra*, § 284.)

Fishing on innavigable streams. See Stats. 1911, c. 706.

Co-owners. (Act of 1889, Page 202 Codified.) Civil Code, Section 842. "When two or more persons are associated by agreement in the use of a ditch, flume, pipe-line or other conduit for the conveyance of water, or who are using such ditch, flume, pipe-line or other conduit, or any part thereof, for the irrigation of land or for any other lawful purpose, to the construction of which they or their grantors have contributed, he is liable to the others for the reasonable expenses of maintaining and repairing the same, and of distributing such water in proportion to the share to which he is entitled in the use of the water."

Civil Code, Section 843. "If any one of them neglects, after demand in writing, to pay his proportion of such expenses, he is liable therefor in an action for contribution, and in any judgment obtained against him interest from the time of such demand must be included. The action authorized by this section must be brought by any or all of the parties who have contributed more than his or their just proportion of such expenses, and may be joint or several, and therein plaintiff may recover as costs, reasonable counsel fees, to be fixed by the court." See Arroyo D. Co. v. Bequette, 149 Cal. 543, 87 Pac. 10.

Servitudes. Civil Code, Section 806. "The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired." *Civil Code, section 811.* "A servitude is extinguished. . . . . (4) When the servitude was acquired by enjoyment, by disuse thereof by the owner of the servitude for the period prescribed for acquiring title by enjoyment."

Damage from Flood, etc. Political Code, Section 3486. Occupants of Land on Banks of Stream Liable for Damages, When. "Any person owning or occupying lands upon the banks of any stream where the lands lying back of such stream are lower than the bank thereof, is responsible for all damages which may be sustained by the owners or occupants of lower lands by reason of any cut or em-

[Miscellaneous]

brasure made in the bank of such stream by the owner or occupant of the bank."

Section 3487. Proof in Mitigation of Damages. "If such cuts were made for the purpose of irrigation, and headgates and culverts have been made which competent persons consider sufficient to restrain the water, and where great diligence has been made to prevent damages, these facts may be pleaded and proved, in mitigation of damages." (Text, *supra*, § 461 et seq.)

Mouth of Creek, etc., Defined. Political Code, Section 3908. "The mouth of a creek, river or slough which empties into another creek, river or slough, is the point where the middle of the channels intersect."

United States Reclamation Service. Statutes of 1905, page 152, chapter 157, provides for co-operation of the State of California with the Federal government's irrigation plans under the National Irrigation Act, provided it does not "interfere with the water already appropriated or in reservoirs or now in use for irrigation purposes, or domestic purposes, under the laws of this State." Statutes of 1906, p. 13, chapter 13, grants the United States a right of way in regard to Calaveras River. See, also, Statutes of 1907, chapters 161, 461, giving the officials a right of entry for inspection upon private and State lands, and Statutes of 1907, chapter 407, concerning water users associations. And Statutes of 1907, page 848, giving rights of way over State lands and making State patents subject thereto.

California Statutes Construed.—In the earlier parts of this book (Parts I to VII, inclusive) California Statutes are construed or cited upon the following pages:

Constitution.

Art. 1, sec. 13 642
Art. 1, sec. 14 .....648, 725
Art. 6, sec. 5 692
Art. 11, sec. 15 326
Art. 12, sec. 10 1177
Art. 12, sec. 23 1196
Art. 14, sec. 1.....306, 410, 650, 1161, 1166, 1168, 1198, 1214, 1221, 1226
Art. 14, sec. 2 1198
Proposed amendment (Sen. Am. 47, c. 60, to amend art. 12, sec. 23)..454, 1196

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(3d ed.)
§ 1433. COLORADO.

Declaration of public ownership.
Appropriation.
Preferences and pro-rating.
Concerning riparian rights.
Ditches on private land—Eminent domain.
Administration.
Determination of existing priorities.
Change of point of diversion.
Method of appropriating.
Fees of State Engineer.
Public service—Water companies and consumers.
Crimes.
Irrigation districts.
Miscellaneous.

References are to Constitution, article 16; Mills' Annotated Statutes, volumes 1, 2, 3 (1905 ed.); Revised Statutes of 1908, sec. 3165 et seq. and succeeding session laws (which, however, contain but little). There is much statutory law upon this subject in Colorado, and the courts have frequently declared irrigation to be one of the most urgent matters in the State. A water code commission was appointed in Laws of 1889, page 466, but accomplished little.

References to the laws of 1911 are to their numbers in the Senate and House files.

These were specially examined in the office of the Secretary of State by Mr. Lawrence Lewis, attorney, of Denver. The volume containing the 1911 Session Laws will not be published for several months. Some of the 1911 enactments may be referred under the new initiative and referendum constitutional amendment, in which case it would be a considerable time before they go into force. Laws not referred go into force August 4th, the date upon which the time for referendum petition expires.

Text, §§ 6, 170.

Declaration of Public Ownership.—"The water of every natural stream not heretofore appropriated, within the State of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the State, subject to appropriation as hereinafter provided." (Const., art. 16, sec. 5.)

The legislature in 1911 (Laws of 1911, c. ——, House Bill 305) passed an act authorizing a joint legislative committee "to investigate the question of the interference by the acts of the Federal

Government or of any State, corporation or individual, with the right of this State to control the waters thereof while within its borders; to authorize legal action concerning the same; and making an appropriation for said purpose" (of $50,000).

Text, § 108.

Appropriation.—"The right to divert unappropriated waters of any natural stream for the beneficial uses shall never be denied" (Const., art. 16, sec. 6); and priority shall give the better right. *(Ibid.)*

Text, § 308.

Preferences and Pro-rating.—In case of deficiency of water, domestic uses prevail over others, and next, irrigation (Const., art. 16, sec. 6). This preference to domestic uses is construed as not extending beyond the common-law preference under riparian rights (see text). The water commissioners may pro-rate the water in time of deficiency between all appropriators, by volume or by time of use (M. A. S. 2259, 2267). Between consumers from the same ditch, pro-rating is provided in times of scarcity (M. A. S., sec. 2267). An appropriation for domestic use shall not be used for irrigation to any extent whatever, saving cities the right to sprinkle streets (3 M. A. S., 1905 ed., 2269a). It is a misdemeanor to change from domestic use to irrigation (Rev. Stats. 1908, secs. 3178, 3179; Laws 1891, p. 402, sec. 1; Laws 1891, p. 403, sec. 2).

By an act of 1911 (Senate Bill 134), a preference (in act of 1891, p. 194, sec. 4) to direct irrigation over storage was repealed. This is known as the "Carpenter Bill," and at this writing there is some possibility of a referendum. The supporters of the bill claim that the bill has the support of the farming elements, but is being opposed by city elements under the current opposition to large enterprises such as reservoir-building.

Text, §§ 118, 119.

Concerning Riparian Rights.—The common law of riparian rights is rejected *in toto.*

The courts have declared that the rejection of riparian rights is not impaired by a statute which provides that all landowners on the banks of a stream are entitled to the use of the water for irrigation, as that merely confers the right to appropriate. (Rev. Stats. 1908, secs. 316 et seq., 3427; Gen. Stats., secs. 1714, 1375;

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M. A. S. 2256; Laws 1861, p. 67, sec. 1; 1862, p. 48, sec. 13; 1864, p. 68, sec. 32; 1870, p. 158, sec. 1, amdg. Rev. Stats., p. 363, sec. 4.) In Colorado Laws of 1861, page 67, section 1, it was provided that all landowners on a stream are entitled to use the water for irrigation. In Session Laws of 1862, section 13, page 48, it is provided that no stream shall be diverted to the detriment of any landowner along it. In Laws of 1864, page 68, section 32, the words "who have a priority of right" were inserted. When controversies arise between such landowners, the court was directed, through commissioners, to "apportion in a just and equitable proportion" (not saying "by priority"). Colo. Rev. Stats. 1908, sec. 3166. This statute is held in Colorado to have *rejected* riparian rights, because it permitted irrigation by the landowners along the stream. See text, *supra,* §§ 119, 366, 367.

Section 1 of the act of 1861 above cited is as follows: "All persons who claim, own or hold a possessory right or title to any land or parcel of land within the boundary of the State of Colorado, as defined in the constitution of said State, when those claims are on the bank, margin or neighborhood of any stream of water, creek or river, shall be entitled to the use of the water of said stream, creek or river for the purposes of irrigation, and making said claims available to the full extent of the soil, for agricultural purposes." (Rev. Stats. 1908, sec. 3165; Gen. Stats., sec. 1711; Gen. Laws, sec. 1372; Rev. Stats., p. 363, sec. 1; Laws 1861, p. 67, sec. 1.)

Compare the "Meadow Act" of 1879. "All persons who shall have enjoyed the use of the water in any natural stream for the irrigation of any meadow land, by the natural overflow or operation of the water of such stream, shall, in case the diminishing of the water supplied by such stream, from any cause, prevent such irrigation therefrom in as ample a manner as formerly, have right to construct a ditch for the irrigation of such meadow, and to take water from such stream therefor, and his or their right to water through such ditch shall have the same priority as though such ditch had been constructed at the time he, she or they first occupied and used such land as meadow ground." (Rev. Stats. 1908, sec. 3176; M. A. S., sec. 2268; Gen. Stats., sec. 1723; Laws 1879, p. 106, sec. 37.) See text, *supra,* § 366.

Because of such Colorado acts as these, appearing to preserve the common law of riparian rights for irrigation, and certain Federal court rulings in Colorado appearing to preserve it as respects everything else (*supra,* § 366 of the text), and certain State court rulings appearing to apply the law of riparian rights to domestic uses (below mentioned), there was ground for some uncertainty upon riparian rights in Colorado. Moreover, it is the impression in that State that the constitutional provision that the right to appropriate unappropriated water shall never be denied precludes statutory regulation of new appropriations in so far as such regulation would deny the right to make an appropriation at the discretion or determination of a public officer, such as the State Engineer. For these reasons Colorado is perhaps not the best exponent of the doctrine of the arid States as opposed to the California doctrine. The writer has, however, used the name "Colorado doctrine," following Long on Irrigation, in designating the doctrine of the desert States as opposed to the "California doctrine"; and the general tone of

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the decisions of both State and Federal courts in Colorado is now very emphatic that riparian rights do not exist at all in that State. See especially Sternberger v. Seaton etc. Co. (1909), 45 Colo. 401, 102 Pac. 168.

Text, c. 10.

Ditches on Private Land —Eminent Domain.—In the territorial court it was held that irrigation ditches could be built over private land without condemnation or compensation (just as, with the rejection of riparian rights, it is held that water may be diverted away from private land), and this has passed into the constitution, article 2, section 14. The discussion in the text has led to the conclusion that the courts nevertheless have withdrawn this rule; and that the provision would violate the constitution of the United States (amendment XIV). The Colorado constitution contains, however, a requirement for compensation in the same regard in article 16, section 7; see, also, M. A. S., section 3158, which prohibits building a ditch over a mining claim without condemnation. And see article 2, section 15, which contains the usual eminent domain provision for a hearing and just compensation.

To obtain a right of way over private land for a ditch condemnation may be resorted to, making compensation. Likewise for enlarging the existing ditch of another, or for changing the point of diversion on another's private land. A landowner shall not be subjected to more than one ditch, where enlargement of existing ditches is possible, and the shortest route must be taken. Rev. Stats. 1908, secs. 3167–3174 (see Laws 1911, c. ——, Sen. Bill 103, repealing sec. 3166 of Rev. Stats. of 1908).

Gen. Stats., secs. 1373–1376, 1712–1721; Rev. Stats. 363; Laws of 1861, p. 67; 1870, p. 158; 1879, p. 95; 1881, pp. 161, 164.

Text, c. 49.

Administration.—All waters are dedicated to the use of the people of the State, subject to appropriation (Const., art. 16, sec. 5). The whole State is divided into five irrigation divisions (3 M. A. S. 1905 ed., 2440 et seq.; Rev. Stats. 1908, secs. 3321–3352). The office of superintendent of irrigation is abolished, and five irrigation division engineers established, one for each division *(Ibid.)*. The Irrigation Division Engineer has general control over the water commissioners of the districts within his division, and makes rules for carrying out the decreed priorities *(Ibid.)*.

[Administration]

Within the irrigation divisions there are water districts (unincorporated). There are sixty-eight of these, formed according to the location of the water supplies, and they are enumerated in M. A. S. 2310 et seq. (Amd. Laws 1909, c. 177). There is one water commissioner for each district whose duties are to carry out the priorities decreed by court (M. A. S. 2381, 2384), and to keep a general lookout over the district (see 3 M. A. S., 1905 ed., 2381–2385a; Rev. Stats. 1908, secs. 3427–3439). He may invoke the aid of the sheriff or constable (M. A. S. 2384), and has himself the power of a constable (M. A. S. 2366).

By Laws of 1911, chapter ——, Senate Bill 531, amendments were made to sections 3335, 3341, 3342, 3344, 3346 of the Revised Statutes of 1908, and increased the term of division engineers from two to four years, and the salaries from $125 per month to $1,500 a year for some divisions and $2,500 a year for others.

The State Engineer has general control over all (3 M. A. S., 1905 ed., 2447h), and general supervising control over all waters within the State (M. A. S. 2459; 3 M. A. S., 1905 ed., secs. 2286a, 2286b). The State Engineer is the nominal head of the administrative system of the State, but, in fact, he has less to do with distributing water than either the division engineers or the water commissioners (Bulletin 168, U. S. Dept. Agric.).

Owners must maintain headgates, measuring devices, etc. Failure to do so is a misdemeanor. The water commissioner may put them in and recover cost, or he may shut off the water (Colo. Rev. Stats. 1908, secs. 3223, 3244 et seq., 3329, as amended in Stats. 1911, c. ——, Senate Bill 134).

Gen. Stats., sec. 1736 et seq.; Laws 1881, p. 165; 1889, p. 161; 1889, p. 374, sec. 9; 1897, p. 176, sec. 2; 1901, p. 193.

Text, c. 51.

Determination of Existing Priorities.—Rev. Stats. 1908, secs. 3276–3290. The Colorado system of determining and adjusting rights, which has been copied in some other States, consist exclusively (3 M. A. S. 2339, 1905 ed.) in a special proceeding before court. The claimant makes an application to the district court or a judge thereof, and a notice thereof is published (M. A. S. 2405 et seq.). The form of hearing is specially provided for (M. A. S. 2403). The judge may order the hearing before a referee,

[Determination of Existing Priorities]

in which case the form of hearing is likewise specially provided for (M. A. S. 2409 et seq.; Rev. Stats. 1908, secs. 3291–3306).

The decree must be specific. A certificate thereof is given and the holder files the certificate with the water commissioners, who act accordingly (M. A. S. 2404). The certificates must be numbered consecutively (M. A. S. 2408), and be recorded (M. A. S. 2404). An appeal may be taken to the supreme court (M. A. S. 2427 et seq.; Rev. Stats. 1908, secs. 3307–3312). A list of decreed priorities is kept by the State Engineer and the Irrigation Division Engineer (3 M. A. S., 1905 ed., 2447i).

A similar procedure is provided for appropriations for other uses as well as for irrigation (3 M. A. S., 1905 ed., 2399a et seq.).

The decree is declared conclusive on all after four years, and nonpresented claims are then barred (Rev. Stats. 1908, secs. 3313, 3314; Gen. Stats. 1796, 1797; Laws 1881, p. 159, secs. 34, 35). Claimants who have taken part in the proceedings may seek a review or appeal within two years, but appeal or review is barred thereafter (Rev. Stats. 1908, sec. 3318; Gen. Stats. 1788; Laws 1881, p. 156, sec. 26).

Text, § 506.

Change of Point of Diversion.—A similar procedure is provided for changes in the point of diversion. Change thereof can be made only if no vested rights are thereby impaired, and to ascertain in advance whether anyone will be injured, a petition must be made to the district court; and the procedure thereunder is the same as above (Rev. Stats. 1908, sec. 3226 et seq.; 3 M. A. S., 1905 ed., 2273d et seq.; Laws 1903, p. 278 et seq.).

If any vested right will be infringed by the change, condemnation proceedings must be further resorted to (Rev. Stats. 1908, sec. 3173; Gen. Stats. sec. 1719; Laws 1881, p. 161. sec. 1). This illustrates the point that the law of appropriation arose upon the public domain, where there were no private rights to be infringed, and the United States in the past permitted unlimited freedom as against itself.

Text, cc. 17, 18.

Method of Appropriating.—The first Colorado act for maps and filings was held unconstitutional because of a defective title (Lamar etc. Co. v. Amity etc. Co., 26 Colo. 370, 77 Am. St. Rep. 261, 38 Pac. 600; Rio Grande etc. Co. v. Prairie etc. Co., 27 Colo. 225, 60 Pac. 726; Beaver etc. Co. v. St. Vrain etc. Co., 6 Colo. App.

[Method of Appropriating]

30, 40 Pac. 1066). The present act of 1903 provides: Within sixty days after beginning work the appropriator must file two duplicate maps with the State Engineer, in a form satisfactory to him, showing headgates, route, high-water line of reservoirs, feeders, etc., ditches leading to or from canals, etc., and the lands where built. Attached to the maps must be sworn statements of location of headgate, dimensions of works, capacity, time of commencement of work, estimate of cost. The State Engineer, if he approves, returns the duplicate map and statement with a certificate of approval, which claimant records with county clerk and recorder. The same is required for enlargements of works. "Provided nothing herein contained shall be construed so as to dispense with the necessity for due diligence in the construction of such projects, or to the injury of those having prior rights to those of the claimants"—or to prevent adjudication of priority as elsewhere provided. (3 M. A. S., 1905 ed., secs. 2265a–2265h; Rev. Stats. 1908, sec. 3181 et seq.; Laws 1903, p. 289.) Some amendments to these provisions were made in Laws of 1911, chapter —— (Sen. Bill 533).

Reservoirs.—Special provisions for reservoirs having a capacity of over seventy-five million cubic feet, etc., are contained in 3 M. A. S., 1905 ed., 2270a et seq., 2286d et seq.; M. A. S. 2270; Rev. Stats. 1908, sec. 3205. Dams over ten feet in height require the approval of the State Engineer (Rev. Stats. 1908, sec. 3323; Laws 1889, p. 372, sec. 3). Concerning State reservoirs and canals, see Rev. Stats. 1908, sec. 3499 et seq.

Fees of State Engineer.—*(Stats. 1911, c. ——, Sen. Bill 537.)*

For the examination and filing of each map and statement describing a claim to a water-right, $10 if the amount of water claimed does not exceed twenty (20) cubic feet per second and an additional $1 for each cubic foot per second claimed in excess of twenty.

One claim consists of one ditch or one reservoir deriving its supply from one stream. Two claims will consist of two ditches or reservoirs deriving their supply of water from one source or one reservoir or one ditch deriving its supply of water from two different sources, etc.

For the examination and filing of each map and statement describing a claim to water for storage, $10 for each one thousand (1,000) acre-feet or fraction thereof of storage capacity claimed.

For filing each judicial decree ordering the transfer of a water-right or the change of a point of diversion, $2.

If more than one transfer is permitted in such decree, two dollars will be charged for each additional transfer.

For each certificate, other than those which may be required in the case of original filings of claims to water-rights, requiring official signature and seal, $2.

For the examination and filing of each set of plans and specifications for a reservoir, dam, embankment or other structure for the purpose of storing or

[Fees of State Engineer]

utilizing water, $1 for each $1,000 or fraction thereof of the estimated cost of such structure or structures.

For copies of maps, $1 for each hour or fraction thereof necessary for the making of such copies.

For each blue-print of a tracing forming a public record, $2.

A white print of a filing three (3) dollars for each sheet.

If a filing consists of two or more sheets each additional sheet will be $2.

For copies of records, twenty (20) cents per folio.

For rating any ditch, canal, reservoir inlet or outlet at the request of the owner or owners thereof or of any agent or employee having control of the same, $10 per day and actual expenses for each day actually and necessarily employed by the hydrographer in making such rating.

(Fee for inspection of reservoir is specified in Revised Statutes of 1908, sections 3206 and 3211.)

Text, Part VII.

Public Service—Water Companies and Consumers.—Constitution, article 16, section 8, provides: "The General Assembly shall provide by law that the board of county commissioners, in their respective counties, shall have power, when application is made to them by either party interested, to establish reasonable maximum rates to be charged for the use of water, whether furnished by individuals or corporations." (Art. 16, sec. 8.) The statutes provide for rate regulation by the county commissioners, upon petition, etc. (Rev. Stats. 1908, secs. 3262 et seq., 3265–3268).

Compulsory service is provided in various disconnected sections (e. g., Rev. Stats. 1908, secs. 3254, 3264; Laws 1879, p. 96, sec. 3; 1893, p. 299, sec. 1); and the company must keep the canal in repair to enable it to furnish the service, and must construct the necessary outlets in its canal to deliver the water to the consumers *(Ibid.* See especially Rev. Stats. 1908, sec. 3255; Laws 1887, p. 305, sec. 2). A neglect or refusal to deliver water is a misdemeanor (Rev. Stats. 1908, sec. 3257). Consumers must see that they do not receive more water than entitled (Rev. Stats. 1908, sec. 3260; Laws 1887, p. 312).

In times of scarcity it is enacted that the supply of any given company shall be pro-rated among its consumers (Rev. Stats. 1908, sec. 3175; Gen. Stats., sec. 1722; Laws 1879, p. 974).

Certain sections of the Law of 1887, p. 309 (Rev. Stats. 1908, secs. 3271–3275), are as follows:

"*3271. Bonus Deemed as Extortionate Rate—Recovery.*—Sec. 107. It shall not be lawful for any person owning, or controlling, or claiming to own or control any ditch, canal or reservoir, carrying or storing, or designed for the carrying or storing of any water taken from any natural stream or lake within this State, to be furnished or delivered for compensation for irrigation, mining, milling, or domestic purposes, to persons not interested in such ownership or control, to demand, bargain for, accept or receive from any person who may apply for water for any of the aforesaid purposes, any money or other valuable thing whatsoever, or any promise or agreement therefor, directly or indirectly, as royalty,

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bonus, or premium prerequisite or condition precedent to the right or privilege of applying, or bargaining for, or procuring such water. But such water shall be furnished, carried and delivered upon payment or tender of the charges fixed by the county commissioners of the proper county, as is, or may be, provided by law. Any and all moneys, and every valuable thing, or consideration of whatsoever kind, which shall be so, as aforesaid, demanded, charged, bargained for, accepted, received, or retained, contrary to the provisions of this section, shall be deemed and held an additional and corrupt rate, charge, or consideration for the water intended to be furnished and delivered therefor, or because thereof, and wholly extortionate and illegal; and when paid, delivered, or surrendered, may be recovered back by the party paying, delivering, or surrendering the same from the party to whom, or for whose use, the same shall have been paid, delivered, or surrendered, together with costs of suit, including reasonable fees of attorneys of plaintiff, by proper action in any court having jurisdiction." (Laws 1887, p. 308, sec. 1.)

"*3272. Penalty for Collecting Excessive Rate.*—Sec. 108. Every person owning or controlling, or claiming to own or control, any ditch, canal or reservoir, such as is mentioned in the first section of this act, who shall, after demand in writing made upon him for the supply or delivery of water for irrigation, mining, milling or domestic purposes, to be delivered from the canal, ditch or reservoir, owned, possessed or controlled by him, and after tender of the lawful rate of compensation therefor, in lawful money, demand, require, bargain for, accept, receive or retain from the party making such application, any money or other thing of value, or any promise or contract, or any valuable consideration whatever, as such royalty, bonus, premium, prerequisite or condition precedent, as is by the provisions of this said first section prohibited, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine of not less than one hundred dollars, nor more than five thousand dollars, or imprisonment for a term not less than three months nor more than one year, or both such fine and imprisonment, in the discretion of the court." (Laws 1887, p. 309, sec. 2. Section 1 referred to above is section 3171 of Revised Statutes of 1908.)

"*3273. Penalty for Refusal to Deliver Water.*—Sec. 109. Every person owning or controlling, or claiming to own or control, any ditch, canal or reservoir, such as is mentioned in the first section of this act, who shall, after demand in writing, made upon him for the supply or delivery of water for irrigation, mining, milling or domestic purposes, to be delivered from the canal, ditch or reservoir, owned, possessed or controlled by him, and after tender of the lawful rate of compensation therefor, in lawful money, refuse to furnish or carry and deliver from such ditch, canal or reservoir, any water so applied for, which water can or may be by use of reasonable diligence in that behalf, and within the carrying or storage capacity of such ditch, canal or reservoir, be lawfully furnished and delivered, without infringement of prior rights, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by fine of not less than one hundred dollars, nor more than five thousand dollars, or imprisonment for a term of not less than three months, nor more than one year, or both such fine and imprisonment, in the discretion of the court." (Laws 1887, p. 309, sec. 3. Section 1 referred to above is section 3271 of Revised Statutes of 1908. See, also, section 992 of Revised Statutes of 1908.)

"*3274. Action When Corporation Refuses to Deliver Water.*—Sec. 110. When any corporation, in defiance or by attempted evasion of the provisions of this act, shall, after tender of the compensation hereinbefore provided for, refuse to deliver water, such as is mentioned in the third section of this act, to any person lawfully entitled to apply therefor, it shall be the duty of the attorney general, upon request of the county commissioners of the proper county, or upon his otherwise receiving due notice thereof, to institute and prosecute to judgment and final determination, proceedings in *quo warranto*, for the for-

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feiture of the corporate rights, privileges and franchises of any such corporation so offending or by *mandamus* or other proper proceedings to compel it to its duty in that behalf." (Laws 1887, p. 310, sec. 4. Section 3 referred to above is section 3273 of Revised Statutes of 1908.)

"*3275. 'Person' Defined—Liability.* Sec. 111. The word 'person,' as used in this act, shall include corporations and associations, and the plural as well as the singular number. And every officer of a corporation, or member of an association, or co-ownership, and every agent violating any of the provisions of this act, shall be liable to restore the unlawful consideration extorted, and be punishable under the penal provisions of this act, the same as if the thing done in disobedience to its provisions were done for his own sole benefit and advantage." (Laws 1887, p. 310, sec. 5.)

Text, § 1280.

Crimes.—Interference with headgate, flume, etc., is a crime (Colo. Rev. Stats. 1908, sec. 3495 et seq.; Gen. Stats., sec. 1759 et seq.; Laws 1881, p. 163; Laws 1901, p. 196, sec. 1 et seq.; Laws 1879, p. 108, sec. 44). "Any person who shall be found using water taken through any such headgate water-box or measuring device so unlawfully interfered with, shall *prima facie* be deemed guilty of a violation of this section." Rev. Stats. 1908, sec. 3497. (Laws 1901, p. 196, sec. 1; amdg. Gen. Stats., sec. 1755; Laws 1879, p. 108, sec. 44.)

Changing use from domestic use to irrigation is a misdemeanor (Rev. Stats. 1908, secs. 3178, 3179; Laws 1891, p. 402 et seq.).

The following are some other criminal provisions in the Revised Statutes of 1908, viz.: Bribery of water commissioner (section 1732). Failure to cover ditch (section 3243). Polluting stream (section 1817). Allowing water to waste (section 3240). Cutting trees which conserve the snow (section 2626).

Text, c. 58.

Irrigation Districts.—Irrigation districts based upon the Wright Act of California are provided in Statutes of 1901, chapter 87, page 198; and Laws of 1903, chapter 123, page 265; and Laws 1905, page 246. Amended in Laws of 1907, chapter 194, page 488; Laws of 1909, chapter 176; Laws of 1911, chapter —— (Sen. Bill 281). The substance of these statutes is set forth *in extenso* in Anderson v. Grand Valley Irr. Dist., 35 Colo. 525, 85 Pac. 313. In this case it was held: (a) The title to the act is not insufficient; (b) The act is in all substantial particulars the same as the California acts, and is constitutional; (c) The difference in doctrine as to the law of waters in the two States has no bearing.

[Irrigation Districts]

The table of contents of the Colorado statute, as given in the Revised Statutes of 1908, is as follows (numbers refer to sections): 3440, irrigation districts. 3441, petition. 3442, presentation and allowance of petition. 3443, notice—election. 3444, same—canvass of votes—proclamation. 3445, officers—election—bond. 3446, same—election notice. 3447, same—election officers' duties. 3448, same—canvass of votes. 3449, same—records—vacancies and term of office. 3450, board of directors—officers—general duties—ratio of water distribution. 3451, directors—meetings — duties — domain — public use. 3452, property—title. 3453, conveyances—suits. 3454, bonds—elections. 3455, bonds — sale — proceeds. 3456, bonds—payment—lien. 3457, board of directors — levy. 3458, assessor — assessment. 3459, county commissioners. 3460, district treasurer. 3461, assessment—collection. 3462, construction—contracts. 3463, claim—audit—payment—financial report. 3464, expense of organization, how defrayed. 3465, crossing streams, highways, railroads, State lands, etc. 3466, officers' salaries—not interested in contracts. 3467, limit of indebtedness. 3468, insufficient supply—distribution. 3469, compensation for property taken. 3470, boundaries—change of—effect. 3471 (amd. by Laws 1911, Sen. Bill 281), contiguous territory—annexation—petition. 3472, contiguous territory—notice. 3473, contiguous territory—hearing. 3474, payment. 3475, boundaries—orders. 3476, order—record—effect. 3477, records—evidence. 3478, legal representatives, petitioners. 3479, redivision of district—election of officers. 3480, exclusion of lands. 3481, petition for exclusion. 3482, same—notice. 3483, same—hearing. 3484, same—orders. 3485, order—record—effect. 3486, division of district. 3487, dissolution of district—election. 3488, same—canvass—record. 3489, judicial examination and confirmation. 3490, same—petition. 3491, same—notice of hearing. 3492, same—answer—pleading. 3493, same—determination—costs. 3494, repeal—saving clause.

Miscellaneous.—Without further attempt at classification, certain miscellaneous provisions are here given that seem worth special notice.

Text, §§ 486, 487.

Measurement of Water.—The State Engineer shall furnish a rating table to be used in measuring the water flowing to or from a public stream into which it has been discharged for conveyance (3 M. A. S., 1905 ed., 2286e). The unit of measurement in general is, for flowing water, one cubic foot per second; for volume, one cubic foot (M. A. S. 2467).

Text, § 38.

Recapture. — The introduction of water into a stream for purpose of conveying it and reclaiming it below is permitted, subject to the supervision of the water officials. See Rev. Stats. 1908, secs. 3203, 3222–3225; Gen. Stats., sec. 1725; Laws 1879, p. 107, sec. 39; Laws 1907, p. 176.

Text, § 461 et seq.

Damage from Escape of Water, Flooding, etc.—The inspection and approval of the State Engineer of the construction of works does not relieve the owner from liability for damages in case of a break, etc. (Rev. Stats. 1908, sec. 3213; Laws 1899, p. 316, sec. 9.) "The owners of the reservoirs shall be liable for all damages arising from leakage or overflow of the waters therefrom or by floods caused by breaking of the embankments of such reservoirs." Rev. Stats. 1908, sec. 3204; Gen. Stats., sec. 1726; Laws of 1879, p. 107, sec. 40. Likewise as to the owners of ditches or canals. Rev. Stats. 1908, secs. 3233, 3238.

Waste of Water Forbidden.—Revised Statutes of 1908, section 3239 (Gen. Stats. 1734; Gen. Laws, 1386; Laws 1876, p. 78, sec. 2) providing: "During the summer season it shall not be lawful for any person or persons to run through his or their irri-

[Miscellaneous]

gating ditch any greater quantity of water than is absolutely necessary for irrigating his or their said land, and for domestic and stock purposes; it being the intent and meaning of this section to prevent the wasting and useless discharge and running away of water."

Text, c. 4.

Use of Waste or Seepage Waters.—"That all ditches now constructed or hereafter to be constructed for the purpose of utilizing the waste, seepage or spring waters of the State, shall be governed by the same laws relating to priority of right as those ditches constructed for the purpose of utilizing the water of running streams: Provided, that the person upon whose lands the seepage or spring waters first arise, shall have the prior right to such waters if capable of being used upon his lands." (Rev. Stats. 1908, sec. 3177; Laws 1889, p. 215, sec. 1.) Concerning rights to water hoisted from a mine, see Revised Statutes of 1908, section 4231.

Text, § 548.

Loan or Exchange of Water.—"It shall be lawful, however, for the owners of ditches and water-rights taking water from the same stream, to exchange with, and loan to, each other, for a limited time, the water to which each may be entitled, for the purpose of saving crops or of using the water in a more economical manner; provided, that the owner or owners making such loan or exchange, shall give notice in writing signed by all the owners participating in said loan or exchange, stating that such loan or exchange has been made, and for what length of time the same shall continue, whereupon said water commissioner shall recognize the same in his distribution of water." (Rev. Stats. 1908, sec. 3232; Laws 1899, p. 236, sec. 3.)

Text, § 348 et seq.

Drainage.—Drainage district laws are contained in Laws of 1909, chapter 161. See Laws 1911, c. —— (Sen. Bill 570). Concerning enlarging or establishing drains, see Revised Statutes of 1908, section 3188 et seq.; Laws of 1903, page 209 et seq.

Various.—Concerning irrigation under the Carey Act, see Laws of 1907, page 367; Laws 1911, c. —— (Sen. Bill 56); Laws 1911, c. —— (Sen. Bill 544). Concerning city water-works districts, see Laws of 1907, page 612. Cities may supply surplus water to outside projects (Laws 1911, c. ——, House Bill 325). Concerning water users associations under the National Irrigation Act, see Laws of 1905, page 360, chapter 141; 3 M. A. S., third edition, section 491, s, t. The constitution, article 10, section 3, provides that ditches, canals and flumes owned and used by individuals or corporations, for irrigating land owned by such individuals or corporations, or the individual members thereof, shall not be separately taxed so long as they shall be owned and used exclusively for such purposes. See, also, Rev. Stats. 1908, secs. 5545, 5546.

Water-rights must be conveyed as real estate (Rev. Stats. 1908, sec. 669). As to the right to place wheels in a stream, see Rev. Stats. 1908, sec. 3180; Gen. Stats., sec. 1727; Gen. Laws, sec. 1377; Rev. Stats., p. 364, sec. 4. Regarding liens of co-owners for work done, see Rev. Stats. 1908, p. 1027, sec. 4051; Laws 1893, p. 312. Regarding mechanic's lien attaching to water-rights, see Rev. Stats. 1908, sec. 4031.

Irrigation of State lands is contained in an act of 1911, c. ——, Sen. Bill 548, granting to the State Board of Land Commissioners power to enter into contracts therefor, etc.

Colorado Statutes Construed.—In the earlier parts of this book (Parts I to VII, inclusive) Colorado Statutes are construed or cited upon the following pages:

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Laws 1899, p. 236, sec. 3 586
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(3d ed.)
§ 1434. HAWAIIAN ISLANDS.

The king was ultimate proprietor in Hawaii of all rights in water, as he was of land, but by custom it became a rule during the last century that tenants should be allowed to use both water and land as by usage they had been doing, and should not be dispossessed without cause. (Haw. Com. Co. v. Wailuku S. Co., 15 Haw. 675.) Rights in water are thus, as against the government, founded and defined by immemorial usage, and between individuals these customary rights are varied by grant and prescription. (Cleghorn's Appeal, 3 Haw. 216.) The decisions of the supreme court are usually based on prescription. In localities where use is only recent and cannot be traced to immemorial custom, it is doubtful what system of law will prevail. The general common law has been adopted in the Islands by statute, and one decision assumes the applicability of the common law of riparian rights, though a later decision expressly left open whether that system is in force in the Islands or not. (Peck v. Bailey, 8 Haw. 658; Wong Leong v. Irwin (1896), 10 Haw. 271.) The latter contains an excellent statement of the common-law principle. As to percolating waters, the English rule is applied. (Davis v. Afong, 5 Haw. 216; Wong Leong v. Irwin, 10 Haw. 270.)

In 1860 a board of commissioners was established for all controversies over rights of way and water-rights, the decision to be such as appears to them just and equitable, and after several amendments, this system is now established by sections 2199 to 2206, Revised Laws of 1905, as amended in Laws of 1907, page 66, chapter 56, substituting a Circuit Judge, sitting in chambers, for the commissioners in the older acts; and allowing appeal to the supreme court from his decision. Under the previous statutes the proceedings before the commissioners were held to be judicial (Cleghorn's Appeal, 3 Haw. 216), and not exclusive of the usual equity jurisdiction in civil suits (Wailuku S. Co. v. Cornwell, 10 Haw. 476); and the commissioners could only define rights and not give damages for past violations (Davis v. Afong, 5 Haw. 216). They apportioned the water usually by periods of time, and exercised a large discretion.

Rights resting on custom, grant or prescription are usually appurtenant to land, but may be separated therefrom for use on other land, or the purpose of use may be changed, if no one is injured thereby (Kaalaea Mill Co. v. Stewart, 4 Haw. 416; Lonoaea v. Wailuku S. Co., 9 Haw. 651); and there are certain "surplus" rights which are not appurtenances to any land (Haw. Com. Co. v. Wailuku S. Co., 15 Haw. 675).

Revised Laws of 1905, Section 366.—"The people shall also have a right to drinking water, and running water, and rights of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple, provided that this shall not be applicable to wells and watercourses which individuals have made for their own use." (By people is meant tenants of plantations or landed proprietors.)

Revised Laws of 1905, Chapter 223, Page 1153.—Special statute to prevent waste of artesian well water on island of Oahu, and prohibiting use of the same for running machinery where it prevents use thereafter for other purposes.

There appears to be nothing in the treaty of annexation or the organic law upon the subject.

In 1910 the Congress of the United States enacted for Hawaii: "The legislature may by general act provide for the condemnation of property for public uses, including the condemnation of rights of way for the transmission of water for irrigation and other purposes." Sess. Laws, 61st Cong., 2d Sess. (1910-11), c. 258, sec. 4.

Hawaiian Islands Statutes Construed.—In the earlier parts of this book (Parts I to VII, inclusive) Hawaiian Islands Statutes are construed or cited upon the following pages:

Code.

Code, sec. 997 1107
Code, sec. 998 1108

Session Laws.

Laws 1878, c. 19 1108
Laws 1888, c. 26 1107

(3d ed.)
§ 1435. IDAHO.

Declaration of State ownership.
Appropriation.
Concerning riparian rights.
Ditches on private land.
Eminent domain.
Preferences and pro-rating.
Administration.
Determination of existing priorities.
Method of appropriating.
Public service—Water companies and consumers.
Irrigation districts.
Measurement of water.
Crimes—Police regulations.
Carey Act.
Miscellaneous.
Idaho statutes construed.

References are to Constitution, article 15, Laws of 1903, page 223, and amendments in Laws of 1905 to 1911, and to Civil Code, 1901, section 2625 et seq.; Code of Civil Procedure, 1901, section 3791 et seq.; MacLean's Revised Codes, section 3240 et seq., covering "Water-rights and Irrigation."

A history of the Idaho water laws is given in Speer v. Stephenson (Idaho, 1909), 102 Pac. 365. The following history is from MacLean's Revised Codes, title IX:

"Two acts passed in 1881 were the basis of the irrigation law of the State for a number of years. The act of February 10, 1881 (Laws 1881, 267), regulated the appropriation of water, requiring the posting of notices at the point of diversion and the recording of the same as in the case of mining claims, and prescribing the manner of procuring rights of way by proceedings before the county commissioners. The act of February 7 (Laws 1881, 273) regulated the distribution of water through watermasters whose election and duties were therein provided for. The provisions of these two acts were substantially perpetuated in the Revised Statutes of 1887, Civil Code, title 9 (secs. 3155–3205). A new act covering the appropriation of water and providing for fixing water rates by the district court was enacted in 1895 (Laws 1895, 174). This act was in part re-enacted and in part repealed by the act of February 25, 1899 (Laws 1899, 380), which added several new provisions to the law and gave to the county commissioners jurisdiction to fix water rates. [These previous laws were based upon the California Civil Code, secs. 1410–1422. See MacLean's Idaho Codes, sec. 3242 et seq]. The appropriation provisions of the 1899 law were repealed by Laws of 1903, 223, which, for the first time, departed from the old system of posting and recording notices of appropriation, placing the matter in the hands of the State Engineer. The present Idaho appropriation law is based on the statutes of Wyoming and Colorado."

The constitution was adopted August 6, 1889, ratified by the people

November, 1889, and approved by Congress July 3, 1890 (Act of July 3, 1890, c. 656, 26 Stat. 215). The first legislative act in pursuance of the constitution for the regulation of water rates was March 7, 1895 (Acts 1895, p. 174).

Text, §§ 6, 170.

Declaration of State Ownership.—There is no express declaration on this point in the law of 1903 or its amendments; but the Civil Code of 1901, section 2625 (Laws 1901, p. 191, sec. 9b; MacLean's Rev. Codes, sec. 3240), contains the following: "All waters of the State, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the State, are declared to be the property of the State."

Text, § 108.

Appropriation.—The right to appropriate unappropriated water "shall never be denied." Const., art. 15, sec. 3.

Text, § 118.

Concerning Riparian Rights.—"All rights to divert and use the waters of this State for beneficial purposes shall hereafter be acquired and confirmed under the provisions of this act." (Stats. 1903, p. 223, sec. 41. See, also, Const., art. 15.) The courts follow the Colorado system rejecting riparian rights *in toto;* except for a recent recognition of a qualified "residuary" riparian right against "mere interlopers." (See text.)

The Colorado statute that all landholders on a stream have a right to the use of its waters was copied, but, as in Colorado, is construed not to adopt riparian rights. (See text, section 119.)

This Idaho act is as follows: "All persons, companies, and corporations, owning or claiming any lands situated on the banks or in the vicinity of any stream, are entitled to the use of the waters of such stream for the purpose of irrigating the land so held or claimed." Rev. Stats. 1887, sec. 3180; MacLean's Rev. Codes, sec. 3299.

Text, c. 10.

Ditches on Private Land.—The early Colorado law in this respect (that irrigators, on the ground of necessity, shall have free rights to build ditches, etc., on another's private land, just as, owing to the rejection of riparian rights, they may divert water from it) was enacted in the Civil Code, section 2549; Rev. Stats. 1887, 3181; 11 Terr. Sess. (1881), 269; MacLean's Rev. Codes, secs. 3300, 3305; Laws 1889, p. 380, sec. 10. But there are also provisions that condemnation proceedings must (and may) be re-

[Ditches on Private Land]

sorted to for that purpose. 11 Terr. Sess. (1881) 271; Rev. Stats. 1887, sec. 3184; Laws 1899, p. 380, secs. 10, 14; MacLean's Rev. Codes, secs. 3303, 3304, 3305.

The statutes, however, are not clear upon the matter; as, for example, the following recently enacted: "Where any lateral ditch has heretofore been, or may hereafter be, constructed across the lands of another, the person or persons owning or controlling the said land, shall have the right at their own expense to change said lateral ditch to any other part of said land, but such change must be made in such a manner as not to impede the flow of the water therein, or to otherwise injure any person or persons using or interested in such lateral ditch." Laws 1907, p. 237, sec. 4; MacLean's Rev. Codes, sec. 3311a.

Text, c. 26.

Eminent Domain.—In the Constitution, article 1, section 14, it is enacted: "The necessary use of lands for the construction of reservoirs or storage basins, for the purposes of irrigation, or for the rights of way for the construction of canals, ditches, flumes or pipes to convey water to the place of use, for any useful, beneficial or necessary purpose, or for drainage; or for the drainage of mines, or the working thereof, by means of roads, railroads, tramways, cuts, tunnels, shafts, hoisting works, dumps, or other necessary means to their complete development, or any other use necessary to the complete development of the material resources of the State or the preservation of the health of its inhabitants, is hereby declared to be a public use, and subject to the regulation and control of the State.

"Private property may be taken for public use, but not until a just compensation, to be ascertained in a manner prescribed by law, shall be paid therefor."

Subdivision 3 of section 5210 of the Revised Statutes of 1887, as amended by the Laws of 1903, page 204, is as follows: "Sec. 5210. Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses: . . . . (3) Wharves, docks, piers, chutes, booms, ferries, bridges, toll-roads, by-roads, plank and turnpike roads, steam, electric and horse railroads, reservoirs, canals, ditches, flumes, aqueducts and pipes, for public transportation, supplying mines and farming neighborhoods with water, and draining and reclaiming lands, and for storing and floating logs and lumber on streams not navigable." See the California Code of Civil Procedure, *supra*.

Further reference is made to the following sections in MacLean's Revised Codes: 5210, uses for which authorized. 5211, what may be taken. 5212, private property defined (amended in Laws 1911, c. 75). 5213, what must appear to authorize condemnation. 5214, survey and location of land required. 5215, jurisdiction in district court. 5216, complaint. 5217, summons. 5218, who may defend. 5219, powers of court. 5220, assessment of damages. 5221, same, date of accrual. 5222, curing defective title. 5223, payment of damages. 5224, same, failure to make

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payment. 5225, final order of condemnation. 5226, possession by plaintiff, payment of damages, appointment of commissioners. 5227, costs. 5228, rules of practice and appeals. 5229, other provisions not repealed.

See Stats. 1911, c. 125, p. 413, regarding condemnation of right of way for drainage.

Text, § 308.

Preferences and Pro-rating.—(Constitution, article 15, section 3.) First, domestic uses; second, mining (in mining districts); third, agricultural; fourth, manufacturing.

Text, c. 49.

Administration.—The Constitution (article 15, sections 4 and 5) provides for State control. The State of Idaho is, by statute, divided into three water divisions, numbered 1, 2 and 3 (Stats. 1903, p. 223, secs. 13–16), with one water commissioner for each division (*Ibid.*, sec. 17), to hold office for six years (*Ibid.*, sec. 18). He shall have general control over his division, under the general supervision of the State Engineer (*Ibid.*, sec. 19, as amended 1905, p. 361). See further, regarding administration, the Statutes of 1907, page 532.

Regarding the State Engineer, reference is also made to the following sections of MacLean's Revised Codes: 149, appointment and qualifications of engineer. 150, office to be provided. 151, oath of office. 152, bond. 153, salary and expenses. 154, duties of engineer. 154a, examination of plans for dams. 155, inspection of dams. 156, same. 157, duty to supply information. 158, attorney general to advise engineer. 159, engineer to make report. 160, additional duties of engineer.

An act of 1911, chapter 58, further gives the horticultural inspector the right to examine ditches, etc.

The State Engineer, after the passage of this act, shall make an examination of the streams of the State (beginning with those whose waters have not yet been allotted), with maps and complete information, on which maps he shall add all rights hereafter licensed or decreed. (Stats. 1903, p. 223, sec. 33.)

A State Board of Irrigation is constituted, consisting of the State Engineer and the three water commissioners. No meeting of said board shall exceed five days, once a year. The board shall provide general rules and regulations concerning proof of completion of works, and for the distribution of water (Stats. 1903, p. 223, sec. 22). See Laws of 1909, page 326, chapter 68, regarding the Board of Irrigation and water officials.

The Board of Irrigation shall divide the State into water districts from time to time as priorities become adjudicated; with

[Administration]

one water-master for each, appointed by the water commissioner of the division, and holding office for one year; in some cases elected by the appropriators. The water-master regulates the distribution of water among the several ditches and to the several appropriators (Stats. 1903, p. 223, secs. 23, 24; see Laws 1909, c. 166, p. 104, regarding water-masters). The water-master must report to the division commissioner, who issues such orders as are necessary to enforce the tabulated priorities of his whole division without inequality among districts (Stats. 1903, p. 223, sec. 25). The water-master shall shut headgates when necessary, having power to arrest all who waste water or interfere with measuring devices, headgates, etc. (*Ibid.*, sec. 26). The water-masters shall not begin work until requested in writing by two or more appropriators (*Ibid.*, sec. 27), the pay of the water-master being a charge against the land of the users who call him in, or against the canal of the canal company, if called in by such company. Concerning pay of water-masters, see, also, Statutes of 1907, page 482.

Text, c. 51.

Determination of Existing Priorities.—Where the waters of any stream have not yet been adjudicated, the water commissioner, within three months after the passage of this act must bring suit in the district court against any and all claimants whose rights are unadjudicated, serving summons by publication. The proceedings shall be conducted in the same manner as actions for the adjudication of water-rights, and the decree shall be deemed a part of and supplementary to the original decree. (Stats. 1903, p. 223, secs. 34, 35. See, also, Code Civ. Proc. (1901), sec. 3791.) This procedure was held unconstitutional. (See text, § 1227.)

Whenever suit is filed in the district court for the adjudication of priorities, the judge shall ask the State Engineer to make an examination of the stream as provided in section 33 of the act of 1903, preparing a map and gathering information, his expenses being part of the costs in the action, and a lien on the lands and water-rights of the parties (Stats. 1903, p. 223, sec. 37, as amended in 1905, p. 357). This part of the act was held constitutional in Boise etc. Co. v. Stewart, 10 Idaho, 38, 77 Pac. 25. The decree must specify the time (not exceeding four years) and amount allowed for future needs. (*Ibid.*, sec. 38. See, also, Laws 1907, p. 507.)

[Determination of Existing Priorities]

Certified copies of decrees now on file must be sent by the clerks of the various district courts to the State Engineer, who tabulates them and sends a certified copy to each water commissioner, who in turn tabulates those of his division and distributes printed copies to the users. The commissioner each year shall print a list of all decrees or licenses issued from time to time and distribute copies among the users (*Ibid.*, secs. 39, 40). Certified copies of all decrees hereafter are transmitted by the clerks of the courts to the State Engineer (*Ibid.*, sec. 39).

An act of 1911 (c. 224, p. 709) provides a summary procedure to establish *prima facie* evidence of a water right omitted from or arising subsequent to an adjudication decree. Suit is to be brought against the water-master, the claimant admitting the former decree and publishing notice. The decision is to be *prima facie* only, and open to collateral attack.

Text, c. 18.

Method of Appropriating.—Before commencing the construction, enlargement or extension, or change in the point of diversion of the ditch, canal or other distributing works, an application must be made to the State Engineer for a permit. "Such application must set forth: (1) The name and postoffice address of the applicant; (2) the source of the water supply; (3) the nature of the proposed use; (4) the location and description of the proposed ditch, channel or other work, and the amount of water to be diverted and used; (5) the time required for the completion of construction of such works, which in no case shall exceed five years from the date of approval of application; (6) the time required for the complete application of the water to the proposed use, which must be within four years after the date set for the completion of such works." Duplicate detailed maps must accompany the application; also, if a corporation, specified detailed matters must be stated concerning the corporation. If for other than irrigation purposes, a statement of the purpose, description of works, whether the water is to be returned to the stream, and where. If for agricultural purposes a description of the land to be irrigated. (Stats. 1903, p. 223, sec. 1, as amended 1905, p. 357. See, generally, MacLean's Rev. Codes, sec. 3252 et seq.) These applications must be numbered consecutively by the State Engineer, who indorses thereon the date of receipt, and makes a rec-

[Method of Appropriating]

ord thereof. He may require the application to be corrected. On approval, the application is so indorsed and returned to the applicant, constituting a permit to proceed. (Stats. 1903, p. 223, sec. 2, as amended 1905, p. 357.)

In 1911 (Stats. 1911, c. 64), section 3254 of the Revised Codes was amended, and pursuant to the amendment, the State Engineer must examine the application, and require its correction if not in proper form. Corrected application shall be returned to the State Engineer within a period of sixty (60) days, or it will be treated as an original application. "It shall be the duty of the State Engineer to approve all applications made in proper form which contemplate the application of water to a beneficial use. . . . . The application so indorsed shall constitute a permit, and shall be returned to the applicant, and he shall be authorized, on receipt thereof, to proceed with the construction. . . . . In his indorsement of approval on any application the State Engineer shall require that actual construction work shall be completed within a period named by him, not exceeding five (5) years from the date of such approval, and that one-fifth (⅕) of such work of construction shall be done within one-half (½) the period of time allowed," etc. . . . . "Extensions of time shall not, together with original permit, be for a longer period than five (5) years." Applicant may appeal to the district court within sixty (60) days. Maps must contain the name of the proposed work, names of the applicant or applicants, and when the proposed works have a capacity of more than twenty-five (25) second-feet, a certificate of the surveyor.

By the same amendment in 1911, one appropriating twenty-five (25) cubic feet or less per second must, within sixty (60) days from issuance of permit, "commence the excavation or construction of the works by which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted, through no fault of the holder of such permit, by circumstances over which he has no control." One appropriating more than twenty-five (25) cubic feet per second must, within sixty (60) days from issuance of permit, file with the State Engineer a bond in an amount to be fixed by the State Engineer, not exceeding ten thousand dollars ($10,000), "conditioned upon faithfully carrying to completion the works

[Method of Appropriating]

of diversion as specified in said permit, the amount of the bond to be fixed by the State Engineer within the limits hereinbefore prescribed."

"The holder of any permit who shall fail to comply with the provisions of this section within the time or times specified shall be deemed to have abandoned all right under his permit" (Stats. 1911, *supra*). If one-fifth of the work is not done within one-half the time allowed, any other holder of a permit may petition the State Engineer for a cancellation of the permit of the other, subject to appeal to the district court (Stats. 1903, p. 223, sec. 3, amd. 1907, p. 532). See further as to cancellations, Laws 1909, chapter 223, page 300.

On completion of the work, proof of completion must be filed with the State Engineer on a form furnished by him, stating a given list of facts, and if to carry over fifty cubic feet per second, must be certified to by a well-known and competent irrigation engineer. This proof is published for four weeks in a newspaper at the expense of the person making the proof. The State Engineer may require further matters in proof of completion (Stats. 1903, p. 223, sec. 4), and must make a full inspection of the works and render a report. He then issues a certificate setting forth certain enumerated details concerning the work (Stats. 1903, p. 223, sec. 5). Any person aggrieved by his determination may appeal to the courts (Stats. 1903, p. 223, sec. 6).

Following completion, proof must be made within four years of the actual application and use of the water. A notice in writing, stating enumerated details, upon forms furnished by the State Engineer, is published for four weeks. After an inspection of the works, and submission of written proof of use, the State Engineer, if satisfied, issues a license confirming such use, bearing the date of the original application for, and the number of, the permit, and stating other details (Stats. 1903, p. 223, sec. 8). Protests against such proof of beneficial application may be filed with the State Engineer (*Ibid.*, sec. 12). Any person aggrieved by the issuance or refusal of a license may appeal to the courts (*Ibid.*, sec. 12).

Priority of right dates from the original application for permit to construct the works (Stats. 1903, p. 223, sec. 8), the licenses and permits being consecutively numbered *(Ibid.)*. Priority on

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any enlargement, extension, or grant of extra time for completion dates from the application for permit to make such enlargement, extension, or to have extra time (Stats. 1903, p. 223, secs. 5 and 8), unless the rights of others are injured (Stats. 1907, p. 314).

Change of place of use may be made upon application to the State Engineer, stating enumerated details, and therewith a plat if required by him. If no one is injured by the change, the State Engineer issues a certificate authorizing the transfer (Stats. 1903, p. 223. See, also, Laws 1907, p. 507. See text, chapter 22).

Concerning method of appropriation on State lands, see Laws of 1907, page 526.

Fees of State Engineer.

For filing application to appropriate, one dollar for the first cubic foot to be appropriated, and ten cents for each additional cubic foot. (Stats. 1903, p. 223, sec. 1, as amended 1905, p. 357.)

For certificate of completion, five dollars for a capacity of ten cubic feet per second or less, and thirty cents for each second-foot additional. (Stats. 1903, p. 223, sec. 10.)

For examination of proof of final use of water, two dollars for each forty acres of land irrigated, and if for other use than irrigation, five dollars. (*Ibid.*)

Certified copies of any papers twenty cents per folio (*Ibid.*).

For certificate of change of place of use, two dollars. (*Ibid.*, sec. 11, as amended 1905, p. 27.)

Text, Part VII.

Public Service—Water Companies and Consumers.

Public Use.—Const., art. 15, sec. 1. "The use of all waters now appropriated, or that may hereafter be appropriated for sale, rental or distribution; also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be, sold, rented, or distributed, is hereby declared to be a public use, and subject to the regulation and control of the State in the manner prescribed by law." (See California Constitution, *supra.*)

Sec. 2. "The right to collect rates or compensation for the use of water supplied to any county, city, or town, or water district, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law." (See California Constitution, *supra.*)

Irrigation companies selling water-rights are required to obtain from the State Engineer a permit to do so (Laws 1909, c. 276, p. 335), and must make annual reports to the State officials (Rev. Codes, sec. 2844).

[Public Service—Water Companies and Consumers]

See text, § 1280.

Compulsory Service.—The constitution, article 15, section 4, reads: "Whenever any waters have been, or shall be, appropriated or used for agricultural purposes, under a sale, rental, or distribution thereof, such sale, rental or distribution shall be deemed an exclusive dedication to such use; and whenever such waters so dedicated shall have once been sold, rented or distributed to any person who has settled upon or improved land for agricultural purposes with the view of receiving the benefit of such water under such dedication, such person, his heirs, executors, administrators, successors, or assigns, shall not thereafter, without his consent, be deprived of the annual use of the same, when needed for domestic purposes, or to irrigate the land so settled upon or improved, upon payment therefor, and compliance with such equitable terms and conditions as to the quantity used and times of use, as may be prescribed by law." (Re-enacted with slight additions, in Rev. Codes, sec. 3291; Laws 1895, p. 174, sec. 14.)

Rev. Codes, sec. 3289. "Any person, company or corporation owning or controlling any canal or irrigation works for the distribution of water under a sale or rental thereof, shall furnish water to any person or persons owning or controlling any land under such canal or irrigation works for the purpose of irrigating such land or for domestic purposes, upon a proper demand being made and reasonable security being given for the payment thereof: Provided, that no person, company or corporation shall contract to deliver more water than such person, company or corporation has a title to, by reason of having complied with the laws in regard to the appropriation of the public waters of this State." (Laws 1899, p. 380, sec. 19.)

See, also, as to compulsory service, Rev. Stats. 1887, sec. 3189; Laws 1901, p. 191, sec. 9b; MacLean's Rev. Codes, secs. 3240, 3248. Refusal to supply is a misdemeanor, Rev. Codes, sec. 7149.

See text, §§ 1287–1305.

Rates.—Constitution, article 15, section 6, reads: "The legislature shall provide by law the manner in which reasonable maximum rates may be established to be charged for the use of water sold, rented or distributed for any useful or beneficial purpose."

Application to fix rates may be made to the county commissioners, who shall proceed to fix a maximum rate for any canal. Rev. Codes, secs. 3294–3298.

". . . . no demand for the purchase of a so-called 'perpetual water-right,' or any contract fixing the annual charges or the quantity of water to be used per acre shall be imposed as a condition precedent to the delivery of water annually as provided in this chapter; but the consumer of water shall be the judge of the amount and the duty of the water required for the irrigation of his land; and the annual charges to be made and to be fixed under the further provisions of this title, shall hereafter be based upon the quantity of water delivered to consumers, and shall not in any case depend upon the number of acres irrigated by means of such amount of water delivered." Rev. Codes, sec. 3290; Laws 1899, p. 380, sec. 20.

Concerning water rates in cities, see Stats. 1907, p. 556.

See text, § 1315 et seq.

Contracts.—Revised Codes, section 3288 (Laws 1895, p. 174, sec. 17), among other things, provides: "Any person, association or corporation which may contract to deliver a certain quantity of water to any party or parties, shall deliver the same to such party or parties. . . . . The amount to be paid by said party or parties for the delivery of said water, which amount may be fixed by contract, or may be as provided by law, is a first lien upon the land for the irrigation of which said water is furnished and delivered."

Whenever a contract gives a perpetual right, "said water-right shall forever remain a part of said tract of land," unaffected by subsequent transfers of title to the water system, or foreclosure of any of the company's bonds. Rev. Codes, sec. 3292.

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See text, § 1282.

Facilities.—Water companies must keep a flow in their ditches sufficient to the requirements of consumers, so far as physically possible (Rev. Codes, sec. 3306), and must furnish outlets, headgates and measuring devices (*Ibid.*, secs. 3286, 3307), and must keep the canal in good order and repair (*Ibid.*, secs. 3307, 3308; Laws 1899, p. 380, sec. 16). The consumers must keep their own laterals in good condition (Rev. Codes, sec. 3288; Laws 1895, p. 174, sec. 17).

See text, § 1283 et seq.

Preferences Among Consumers.—Priority of time of use governs among consumers unless the legislature shall provide otherwise for times of scarcity (Const., art. 15, sec. 5). Consumers must apply each year before January 1st, and preference shall be given to applicants using water the previous year, after which the surplus shall be distributed to new applicants in the numerical order of their application (Rev. Codes, sec. 3290; Laws 1899, p. 380, sec. 20). The company may divide the lands into classes, having relative rights of supply, with reference to enlargement from time to time of the water system (Rev. Codes, sec. 3287; Laws 1901, p. 191, sec. 9a).

Text, c. 58.

Irrigation Districts.—Irrigation districts based on the Wright Act of California are provided (Stats. 1899, p. 408; 1903, p. 150), and previous acts amended at length in Statutes of 1907, page 484. See, also, Stats. 1911, ec. 22, 46, 71, 154, 181. Irrigation districts may exercise the power of eminent domain or purchase water-rights (Stats. 1907, p. 221).

The first act in this State on the subject is Laws of 1895, 183, which was superseded by Laws of 1897, 146. The latter act was amended, and re-enacted as amended by Laws of 1899, 408; and repealed by Laws of 1903, 150, which is amended by Laws 1907, 484. The present law appears in title 14 of MacLean's Revised Codes, in the following chapters: 1, organization of district. 2, election of directors. 3, powers and duties of the board of directors. 4, issuance, confirmation and sale of bonds. 5, levy and collection of assessments. 6, construction work and acquirement of property. 7, changing boundaries and consolidation. 8, miscellaneous provisions.

In the Statutes of 1911, chapter 22 concerns Black Canyon Irr. Dist.; chapter 46 amends section 2434 et seq. of the Revised Codes concerning exclusion of lands. See, also, chapter 71.

Text, §§ 486, 487.

Measurement of Water.—No one shall be authorized to divert for irrigation purposes more than one cubic foot per second for each fifty acres unless it is shown to the satisfaction of the State Engineer that more is needed (Laws 1903, p. 223, sec. 1, as amended 1905, p. 357). For irrigation no license must exceed one second-foot for each fifty acres, unless the State Engineer or court is convinced that more is necessary; and the right to use water shall always be subject to local or community customs, rules and regulations adopted by a majority of the users from a com-

[Measurement of Water]

mon source of supply (Stats. 1903, p. 223, sec. 9, as amended 1905, p. 174).

Crimes—Police Regulations.—Appropriators must maintain headgates, rating flumes, and measuring devices, under plans furnished by the State Engineer, and if they fail to do so, the county may build them at the cost of the appropriator, closing the headgate if he refuses to pay (Stats. 1903, p. 223, sec. 31). Changing headgates, and interference in general with water officials, is a crime (Stats. 1907, p. 237).

Reference is also made to the following sections of MacLean's Revised Codes: 7144, wasting water used for irrigation. 7144a, obstruction of overflow and gauges. 7144b, wrongful diversion of water. 7144c, interference with headgate, cutting banks of stream. 7145, injuries to ditches and appurtenances. 7146, injury to measuring devices. 7147, change of lateral ditch. 7148, punishment for violation of preceding sections. 7148a, unauthorized tampering with measuring devices. 7149, neglect to deliver water, interference with delivery.

Text, c. 59.

Carey Act.—The State law under the Federal act is contained in MacLean's Revised Codes, in the following sections thereof:

1613, acceptance of the Carey Act. 1614, duties of register. 1615, proposals to construct irrigation works. 1616, certified check to accompany proposal. 1617, application for appropriation permit to be filed. 1618, submission of proposal to State Engineer. 1619, approval of application by board. 1620, adverse report by engineer. 1621, contract of proposed contractor. 1622, same, limitations on terms. 1623, forfeiture of contract for contractor's default. 1624, State not to be responsible for work. 1625, publication of notice of opening. 1626, application to enter land. 1627, disposition of proceeds of sale. 1628, proof of reclamation by settlers. 1629, water contracts a lien on land, foreclosure. 1630, rights of way for canals. 1631, board to prescribe rules, reports of contractors. 1632, fees of board. 1633, board to issue report. 1634, suits by board.

In the Statutes of 1911, see chapters 3, 14, 35, 51, 201, 219.

Miscellaneous.—Ditches and water-rights are declared real property (Rev. Stats. 1887, sec. 2825). Nonuse for five years causes loss of right (Laws 1907, p. 507), with a proviso which seems to except from this provision nonuse during annual increase of use, or what we have called "appropriations for future needs." Water-rights shall be appurtenant to the land or other thing with which used (Rev. Codes, sec. 3240; Laws 1901, sec. 9b).

See text, c. 21.

Beneficial Use.—Revised Codes, section 3293. "No person entitled to the use of water from any such ditch or canal, must, under any circumstances, use more water than good husbandry requires for the crop or crops that he cultivates; and any person using

[Miscellaneous]

an excess of water, is liable to the owner of such ditch or canal for the value of such excess; and in addition thereto, is liable for all damages sustained by any other person, who would have been entitled to the use of such excess of water, as fixed by this section." Rev. Stats. 1887, sec. 3190; 11 Terr. Sess. (1881) 273.

See text, § 55.

Waste Water, Use of.—Revised Codes section 3246, reads: "All ditches now constructed or which may hereafter be constructed for the purpose of utilizing seepage, waste or spring water of the State, shall be governed by the same laws relating to priority of right as those ditches, canals, and conduits constructed for the purpose of utilizing the waters of running streams." Laws 1899, p. 380, sec. 23.

See text, § 284.

Exemption from Taxation.—"The following property is exempt from taxation: All irrigating canals and ditches and water-rights appurtenant thereto, when the owner or owners of said irrigating canals and ditches use the water thereof exclusively upon land or lands owned by him or her or them: Provided, in case any water be sold or rented from any such canal or ditch, then, in that event, such canal or ditch shall be taxed to the extent of such sale or rental." Rev. Stats., sec. 1402; Laws 1899, p. 221. (See, also, Laws 1911, c. 127.)

See text, § 38 et seq.

Carriage of Stored Water in Streams.—Approval of State Engineer is required by Laws of 1909, page 150, chapter 197. See, also, Laws 1911, c. 149, p. 454.

Various.—Liability for damages from breaking ditches and flooding, MacLean's Rev. Codes, sec. 3300; Rev. Stats. 1887, sec. 3181; 11 Terr. Sess. (1881) 269. Rights and duties of tenants in common, Rev. Codes, sec. 3311; see, also, Laws 1909, p. 108.

Water users associations under National Irrigation Act, see Rev. Codes, secs. 2842, 2843; Laws 1905, p. 373, sec. 3. Regarding reservoirs and rights of way on State lands, see Rev. Codes, secs. 1635–1638; Laws 1909, c. — (House Bill No. 196). An act of 1911, chapter 9, gives counties the right to spend one thousand dollars in seeking Federal aid for projects. See Stats. 1911, c. 221, p. 703, regarding private bridges, etc.

Lakes on private land (under five acres in area) cannot be appropriated against the landowner. (Stats. 1911, c. 230.

Idaho Statutes Construed.—In the earlier parts of this book (Parts I to VII, inclusive) Idaho Statutes are construed or cited upon the following pages:

Constitution.

Art. 1, sec. 14 .....650, 1166
Art. 2, sec. 17 649
Art. 15, sec. 1 .....1097, 1161, 1166
Art. 15, sec. 2 1161
Art. 15, sec. 3 .....120, 143, 154, 324
Art. 15, sec. 4 .....194, 1181, 1184
Art. 15, sec. 5 .....194, 1246
Art. 15, sec. 6 1199

Revised Statutes, 1887.

Rev. Stats. 1887, sec. 2825 ..... 298, 300
Rev. Stats. 1887, sec. 3180 144
Rev. Stats. 1887, sec. 3181 ..... 249, 490, 657
Rev. Stats. 1887, sec. 3184 ..... 144, 657
Rev. Stats. 1887, sec. 3189 1181
Rev. Stats. 1887, sec. 4043 ..... 301, 629, 639
Rev. Stats. 1887, sec. 5210, subd. 3 650

Codes, 1901.

Civ. Code, sec. 2549 249
Civ. Code, sec. 2625 194
Code Civ. Proc., sec. 3791 1121

Revised Codes.

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Session Laws.

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Laws 1889, p. 380 249
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Laws 1889, p. 380, sec. 18 1182
Laws 1895, p. 174, sec. 14 1181
Laws 1897, p. 127, sec. 2 1185
Laws 1899, p. 221 301
Laws 1899, p. 380, sec. 10 657

Session Laws—Continued.

Laws 1899, p. 380, sec. 14..... 657
Laws 1899, p. 380, sec. 16.....1186
Laws 1899, p. 380, sec. 19.....1181
Laws 1899, p. 380, sec. 20.....1181, 1182, 1193, 1230
Laws 1899, p. 380, sec. 23..... 50
Laws 1899, p. 408.....1260
Laws 1901, p. 191..... 387
Laws 1901, p. 191, sec. 9a.....1184
Laws 1901, p. 191, sec. 9b.....194, 296, 587, 1181
Laws 1903, p. 150.....1260
Laws 1903, p. 204..... 650
Laws 1903, p. 223..154, 296, 445, 449, 453, 454, 515, 551, 587, 696, 733, 1098, 1123
Laws 1903, p. 223, sec. 9..... 523
Laws 1903, p. 223, sec. 34.....1121
Laws 1903, p. 223, sec. 37.....1121
Laws 1903, p. 250, sec. 38.....1132
Laws 1905, p. —, c. 23, sec. 52b..... 120
Laws 1905, p. 27..... 620
Laws 1905, p. 174.....523, 587, 696
Laws 1905, p. 357.....449, 515, 1121
Laws 1905, p. 373.....1309
Laws 1905, p. 373, sec. 2.....1319
Laws 1905, p. 373, sec. 3.....1319
Laws 1907, p. 221.....1260
Laws 1907, p. 237.....542, 733, 1100
Laws 1907, p. 314.....453, 454
Laws 1907, p. 484, c. 140.....1260
Laws 1907, p. 507.....296, 516, 551, 620
Laws 1907, p. 526..... 233
Laws 1907, p. 556.....1199
Laws 1909, p. 104, c. 166.....1099
Laws 1909, p. 108..... 345
Laws 1909, p. 150, c. 197..... 44
Laws 1909, p. 300, sec. 223..... 452
Laws 1909, p. 326, c. 68.....1098
Laws 1909, p. 335, c. 276.....1194
Laws 1911, c. 3.....1266
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Laws 1911, c. 22.....1260
Laws 1911, c. 35.....1266
Laws 1911, c. 46.....1260, 1261
Laws 1911, c. 51.....1266
Laws 1911, c. 64.....442, 444, 449, 451, 454

Session Laws—Continued.

Laws 1911, c. 71....1260
Laws 1911, c. 154, p. 461....1260
Laws 1911, c. 181, p. 587....1260
Laws 1911, c. 201....1266
Laws 1911, c. 219....1266
Laws 1911, c. 224, p. 709....687, 1122
Laws 1911 (Sen. Bill 20, House Bills 111, 245)....1266

(3d ed.)

§ 1436. KANSAS.

Concerning riparian rights.
Administration.
Eminent domain—Canals on private land.
Preferences.
Method of appropriating.
Public service—Water companies and consumers.
Underground water.
Irrigation districts.
Miscellaneous.
Kansas statutes construed.

The statutes of Kansas resemble the Civil Code of California, though with variations and additions. (Gen. Stats. 1909, c. 59, sec. 4403 et seq.; Gen. Stats. 1901, secs. 3609–3613.) There is nothing in the State constitution upon this subject. References include the Session Laws of 1911.

Text, § 118.

Concerning Riparian Rights.—The court has followed the California system, recognizing the common law of riparian rights for private lands.

Text, c. 49.

Administration.—Kansas has no State Engineer. An act of 1895, chapter 162, provided for a board of irrigation. In General Laws of 1909, section 4443 et seq., are provisions regarding maintenance of headgates, etc. In 1911 (chapter 210, page 363) a system of administration over artesian wells, under an "artesian well supervisor," was provided for. There are numerous provisions regarding public control of public service, below referred to.

Text, cc. 10, 26, 37.

Eminent Domain—Canals on Private Land.—See General Laws of 1909, sections 4410 et seq., 4431, 4437, 4438.

Text, § 308.

Preferences.—West of the 99th meridian, domestic uses are first, irrigation second, and other uses third; condemnation being required before a preferred use can oust an unpreferred one. Gen. Laws 1909, sec. 4423.

Text, cc. 17, 18.

Method of Appropriating.—The General Statutes of Kansas of 1909 (section 4403 et seq.) upon this subject cover numerous pages. One of the earliest is a law of February 26, 1886 (chapter 115), which reads as follows: "The right to the use of running water flowing in a river or stream in this State for the purposes of irrigation may be acquired by appropriation. As between appropriators, the one first in time is the first in right." (Gen. Stats. 1909, sec. 4405; Gen. Stats. 1901, sec. 3501.) A notice of the proposed appropriation must be posted at the point of intended diversion and within ten days thereafter a copy of the same must be posted in a conspicuous place in the office of the county clerk of the county in which the diversion is situated and be recorded by the county clerk (Gen. Stats. 1909, sec. 4407).

"Within six months after the notice is posted, the claimant must commence the excavation or construction of the works in which such claimant intends to divert the water and must prosecute the work diligently and uninterruptedly to completion, unless interrupted by stress of weather or other unavoidable circumstance. By compliance with the above the claimant's right to the use of the water relates back to the time the notice was posted. A failure to comply with the above conditions shall deprive the claimant of the right to use of the water as against a subsequent claimant who complies therewith; provided, that in any case wherein such notice has already been posted and the said sixty days has not yet expired the party or parties posting said notice, or their grantees or assigns shall have six months from the taking effect of this act within which to commence the excavation or construction of the works as herein provided." (Gen. Stats. 1909, sec. 4408, as amended by Laws 1911, c. 216, p. 380.)

Text, Part VII.

Public Service.—The Railroad Commission is created a Public Service Commission, with jurisdiction over water and irrigation companies and their rates (Laws 1911, c. 238, p. 417; Gen. Stats. 1909, sec. 4477). Exacting a bonus is criminal (Gen. Stats. 1909, sec. 4503 et seq., similar to the Colorado statute). There are various provisions covering the rights of consumers (see Gen. Laws 1909, secs. 4432 et seq., 4443 et seq.; Laws 1905, cc. 23, 52b). Canal owners have a lien upon the land for irrigation rates (Gen. Laws 1909, sec. 4403); and are under duty to keep the canal in repair so as to properly deliver water (Stats. 1911, c. 213, p. 377).

Text, Part V.

Underground Water.—In General Laws 1909, sections 4427–4429, inclusive (Gen. Stats. 1901, secs. 3631–3633, inclusive), are the following provisions regarding underground water:

Section 4427 (as amended by Stats. 1911, c. 212, p. 376). "All waters flowing in subterranean channels and courses, or flowing or standing in subterranean sheets or lakes, south of township 18 and west of the 99th meridian, shall belong and be appurtenant to the lands under which they flow or stand, and shall be devoted, first, to the irrigating of such lands in aid of agriculture, subject to ordinary domestic use. Second, subject to such use, may be devoted to other industrial purposes; provided, however, that nothing herein contained shall, in any way, affect appropriations heretofore made."

This section had formerly (until 1911) read as follows:

"Waters flowing in well-defined subterranean channels and courses, or flowing or standing in subterranean sheets or lakes, shall be subject to appropriation with the same effect as the water of superficial channels; and no person shall be allowed by drains, ditches, fountains, subterranean galleries, or other works to collect and divert percolating waters manifestly supplying such subterranean supplies, to the prejudice of any prior appropriator thereof: *Provided*, that nothing in this section contained shall be so construed as to render any person liable in damages for the diversion or obstruction of the flow of subterranean waters by lawfully excavating for cellars, or for mining, quarrying, or carrying on like works on his own lands, nor for excavating drains for draining and improving his own lands, nor so as to prohibit the proprietor of any lands from sinking wells therein, and thereby collecting the waters percolating through lands, and by means of pumps, buckets, and other appliances withdrawing the same for beneficial uses on his own land: *And provided further*, that any appropriation and diversion of subterranean waters which simply lower a water level without in fact exhausting or seriously diminishing the actual and needful supply of any prior appropriator for domestic or other beneficial uses shall not be considered an unlawful appropriation or diversion thereof."

Section 4428. Not to Take.—"No person shall be permitted to take or appropriate the waters of any subterranean supply which naturally discharge into any superficial stream, to the prejudice of any prior appropriator of the water of such superficial channel."

Section 4429. Who Deemed to have Appropriated.—"Every person complying with the provisions of this act, and applying the waters obtained by means of any artesian well to beneficial uses, shall be deemed to have appropriated such waters to the extent to which the same shall be so applied within a reasonable time after the commencement of the works, and such appropriation

[Underground Water]
shall have effect as of the day of commencement of such works, provided the same is prosecuted within reasonable diligence; otherwise, from the time of the application of the waters thereof to beneficial uses."

There is also an extensive system to regulate artesian wells. (Gen. Stats. 1909, sec. 4452 et seq.; Laws 1911, c. 210, p. 363.)

Text, c. 58.

Irrigation Districts.—Irrigation districts under the Wright Act of California appear in General Statutes of 1909, section 4479 et seq.; and section 4527 et seq. (Gen. Stats. 1899, sec. 3575 et seq.; Gen. Stats. 1901, sec. 3683 et seq.). See, also, Statutes of 1911, chapters 168 to 177, regarding Drainage and Drainage Districts.

Miscellaneous.—Beneficial use limits appropriations (Gen. Laws 1909, sec. 4424), and the use may be changed (*Ibid.*, sec. 4406). Nonuse is an abandonment (*Ibid.*, sec. 4430), and a right of way is lost by nonuse for two years (*semble, Ibid.*, sec. 4442), and sale or lease of a water-right is an abandonment (*semble, Ibid.*, sec. 4436), the water-right being appurtenant to the land and passing with it on a sale unless expressly reserved (Laws 1911, c. 215, p. 379). Water may be run into a stream and taken out again, or recaptured (Gen. Laws 1909, sec. 4425). Injuring water structures is a crime (*Ibid.*, sec. 4404). See, also, Statutes of 1909, page 542, to protect public health; Statutes of 1911, chapter 211, page 374, giving a bonus by remission of taxes to landowners building reservoirs to impound surface water on their lands; and Statutes of 1911, chapter 214, page 378, providing for an irrigation investigation.

Kansas Statutes Construed.—In the earlier parts of this book (Parts I to VII, inclusive) Kansas Statutes are construed or cited upon the following pages:

General Statutes and Laws.

Gen. Stats. 1899, secs. 3575–3598 1261
Gen. Stats. 1901, sec. 3501 413
Gen. Stats. 1901, sec. 3523 1072
Gen. Stats. 1901, secs. 3609–3613 388
Gen. Stats. 1901, sec. 3631 1078

General Statutes and Laws—Continued.

Gen. Stats. 1901, sec. 3632 1024
Gen. Stats. 1901, sec. 3683 1261
Gen. Stats. 1905, sec. 3791 388
Gen. Stats. 1905, sec. 4883 629
Gen. Stats. 1909, sec. 4430 620
Gen. Stats. 1909, sec. 4436.....586, 596, 607
Gen. Stats. 1909, sec. 4442 620
Gen. Stats. 1909, sec. 4479 1261
Gen. Stats. 1909, sec. 4503 1181
Gen. Stats. 1909, sec. 4527 1261
Stats. 1911, c. 210, p. 363.....1072
Stats. 1911, c. 213, p. 377.....1186
Stats. 1911, c. 215, p. 379..... 591
Stats. 1911, c. 238, p. 417.....1197

(3d ed.)
§ 1437. MONTANA.

Declaration of State ownership.
Concerning riparian rights.
Administration.
Method of appropriating.
Determination of existing priorities.
Public service—Water companies and consumers.
Irrigation districts.
Miscellaneous.
Montana statutes construed.

References are to Constitution, article 3; Revised Codes of 1907, sections 4840 et seq., 4881 et seq.; Compiled Statutes of 1887, section 250 et seq.; Civil Code of 1895, sections 1880–1892, Amended Statutes of 1901, page 152; Session Laws of 1905–11. An Irrigation Code Commission was created in Laws of 1905, page 184, chapter 90, and an irrigation statute passed in Laws of 1907, chapter 185, page 489, based rather on the original California system than on the water codes of the arid States, although the commission had prepared a draft based upon the latter.

Text, §§ 6, 170.

Declaration of State Ownership.—Civil Code, section 1880 et seq. (Rev. Codes 1907, sec. 4840 et seq.), recognizes the doctrine of prior appropriation, and has been said to declare waters the property of the State. (See Smith v. Denniff, 23 Mont. 65.) The actual wording is that the waters "of this State" may be appropriated.

Text, § 117.

Concerning Riparian Rights.—The decisions uphold the riparian rights of private land, following the California system. All landowners on the banks of a stream have by statute the right to use the water thereon for irrigation. (Ban. Stats., 367, secs. 1, 2.) This statute in some States is held to recognize riparian rights; in others, only the law of prior appropriation (see text, § 119 et seq.).

Text, c. 49.

Administration.—Water commissioners are provided to carry out court decrees. (Stats. 1911, c. 43, p. 72; Stats. 1905, p. 145;

[Administration]

Stats. 1899, p. ——.) These commissioners have little resemblance to those under water codes.

A statute conferring on commissioners the power to apportion the water of any creek according to the legal rights of the parties was held unconstitutional as conferring on them judicial powers. (Text, § 1192).

Montana has a State Engineer, who is secretary of the Carey Land Act Board, but otherwise is not connected with the use of waters, except to make a stream survey of the State. (Stats. 1911, c. 128, p. 352.)

Text, cc. 17 and 18.

Method of Appropriating.—Statutes of 1907, chapter 185, page 489 (Rev. Codes 1907, sec. 4871 et seq.).

Sec. 4. "Any person desiring to appropriate water in any stream, creek, canyon, river or ravine, wherein the rights of water therein have been adjudicated and decreed, shall post a notice in writing in a conspicuous place at the point of the intended diversion, stating therein: 1. The flow claimed, expressed in cubic feet per second; 2. The purpose for which said water is claimed, and the place of intended use; 3. The name of the stream, creek, spring, canyon, river or ravine; 4. The name of the appropriator or appropriators; 5. The date of posting said notice.

"The work in the construction and completion of the means of diverting and conveying water to place of use, shall be prosecuted with reasonable diligence, otherwise no rights shall be acquired by such appropriator, and no appropriator shall acquire any rights to water in excess of the carrying capacity of the ditch or means of conveying water, nor in excess of the amount actually needed by the appropriator for some useful and beneficial purpose."

Within forty days after completion (for irrigation) application must be made to the clerk of the district court (with a sworn statement), who orders examination by some competent civil engineer, to be finished within thirty days. The clerk publishes once a week in three successive issues of a newspaper a notice, and before the last publication, written objections by others may be filed with the clerk. If no objection is filed, the court enters an order allowing the appropriation. If there are objections, a hearing is had, and the court may make any order it deems proper. The fees of court and of the surveyor must be deposited with the

[Method of Appropriating]

clerk of the court in advance (e. g., cost of survey not over ten dollars per day and traveling expenses; plats, five dollars each), and until the fees are paid no water-right shall be valid (section 7). The clerk of the court shall keep a separate book for these records (section 9).

Text, Part VI.

Determination of Existing Priorities.—No comprehensive system for determining existing priorities is fixed; but new appropriations, as above, are established at their initiation by decrees of court. It is also provided that appropriations hereafter are subject to all existing decrees of court concerning the stream (Stats. 1907, c. 185, secs. 1–3; Rev. Codes 1907, sec. 4871 et seq.).

All existing claimants may be made parties to a single suit (Civ. Code, sec. 1891). After rights have been decreed, commissioners may be appointed by the court to execute them *(supra)*, and owners must maintain headgates, measuring devices, etc. (Laws 1905, p. 145, sec. 7).

Text, Part VII.

Public Service—Water Companies and Consumers.—The Constitution, article 3, section 15, contains the following variation of article 14, section 1, of the California Constitution:

"The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, distribution or other beneficial use, and the right of way over the lands of others for all ditches, drains, flumes, canals and aqueducts necessarily used in connection therewith, as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use."

The Civil Code contains the following sections, among others:

Section 1897. "Any person having the right to use, sell or dispose of water, and engage in using, selling or disposing of the same, who has a surplus of water not used, or sold, or any person having a surplus of water, and the right to sell or dispose of the same, is required, upon the payment or tender to the person entitled thereto an amount equal to the usual and customary rates per inch, to convey and deliver to the person such surplus of unsold water, or so much thereof for which said payment or tender shall have been made, and shall continue so to convey and deliver the same weekly so long as said surplus of unused or unsold water exists and said payment or tender be made as aforesaid."

Section 1898. "Any person desiring to avail himself of the provisions of the preceding section must, at his own cost and expense, construct or dig the necessary flumes or ditches to receive and convey the surplus water so desired by him, and pay the tender to the person having the right to the use, sale or disposal thereof, an amount equal to the necessary cost and expense of tapping any gulch, stream, reservoir, ditch, flume or aque-

[Public Service—Water Companies and Consumers]

duct, and putting in gates, gauges or other proper and necessary appliances usual and customary in such cases, and until the same shall be so done, the delivery of the said surplus water shall not be required as provided in the preceding section."

Section 1899. "Any person constructing the necessary ditches, aqueducts or flumes, and making the payments or tenders hereinbefore provided, is entitled to the use of so much of said surplus water as said ditches, flumes or aqueducts have the capacity to carry, and for which payment or tender is made, and may institute and maintain any appropriate action at law or in equity for the enforcement of such right or recovery of damages arising from a failure to deliver or wrongful diversion of the same."

Section 1900. "Nothing in the three preceding sections shall be so construed as to give the person acquiring the right to the use of water as therein provided, the right to sell or dispose of the same after being so used by him, or prevent the original owner or proprietor from retaking, selling and disposing of the same in the usual and customary manner, after it is so used as aforesaid."

Text, c. 58.

Irrigation Districts.—Irrigation districts based on the Wright Act of California are provided in Statutes of 1907, page 136; Laws of 1909, page 254, chapter 146.

Miscellaneous.—The amount of an appropriation is limited to beneficial use, and any unused surplus diverted must be returned to the stream on written demand by a subsequent appropriator, or he will be entitled to damages resulting from the failure to do so (Stats. 1907, p. 109. See, also, Civ. Code, secs. 1881, 1884). One hundred miner's inches are declared equal to two and one-half cubic feet per second ("second-feet") (Stats. 1907, p. 489, sec. 10. See, also, Laws 1899, p. ——). Appropriations by the United States Reclamation Service are authorized (Stats. 1905, c. 44, p. 80). Concerning water users associations, see Laws 1909, page 86. Regarding change of name of streams, see Laws 1911, c. 101, p. 175. Regarding floating logs, see Laws 1911, chapter 147, page 496. Concerning water or irrigation of State lands, see Laws 1911, chapter 118, page 254; Laws 1911, chapter 123, page 338.

In Billings etc. Co. v. Fish, 40 Mont. 256, 106 Pac. 571, the supreme court of Montana says (referring to statutes for the formation of drainage districts):

"Montana, for years past, has been known to the world as a great mining State, and our mining industries are still prosecuted on a gigantic scale; but we believe statistics show that our agricultural development in the past few years has been so great that the products thereof now exceed in value the wealth produced by our mines. While we have a gross area of almost 150,000 square miles, there are in the State great regions of mountainous country which, it would now appear, can never be cultivated. Our lands that are suitable for agricultural purposes are being settled very rapidly, and the legislative and executive departments of the government are constantly engaged in com-

[Miscellaneous]

mendable and successful endeavor to attract immigration to the State. The time has come when public policy and the welfare of the whole people seem to demand that all available portions of the State should be made productive. In the early days it was necessary, on account of the very limited development of our agricultural resources, to bring into the territory and State nearly all of those products of the soil which were in constant daily demand by the people. We produced large quantities of gold, silver, copper, lead, and other valuable metals, and raised great herds of cattle and sheep. The products of our mines and ranges were shipped mostly out of the State, and in return we were buyers of almost everything, save cattle and sheep, raised upon a farm. This system necessitated the expenditure of vast sums in the aggregate for transportation, and the price of farm products was correspondingly high. This condition affected all of the people in the State. To-day great lumbering operations are being carried on; our mines are in operation; new fields of industry are constantly being exploited; our cities and towns are growing in population, and, in consequence, our home market is increasing in scope and demand."

Montana Statutes Construed.—In the earlier parts of this book (Parts I to VII, inclusive) Montana Statutes are construed or cited upon the following pages:

Constitution.

Art. 3, sec. 15 658

Bannock's Statutes.

Bannock's Stats., 367, secs. 1, 2 144

Compiled Statutes.

Comp. Stats. 1887, sec. 1240 ..... 249, 657

Civil Code.

Civ. Code, sec. 1880 ..... 194, 251, 388
Civ. Code, sec. 1881 ..... 503, 619
Civ. Code, sec. 1882 ..... 542, 548, 555
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Civ. Code, sec. 1884 503
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Civ. Code, sec. 1892 388
Civ. Code, sec. 1894 657
Civ. Code, sec. 1897 ..... 1166, 1181
Civ. Code. sec. 1898 1185
Civ. Code, sec. 1900 ..... 551, 1190, 1248

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Rev. Codes, sec. 4840 ..... 251, 934
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Rev. Codes, sec. 4846 1276

Session Laws.

Laws 1899, p. 117 520
Laws 1901, p. 152 388
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Laws 1909, p. 254, c. 146 1261
Laws 1911, c. 43, p. 72 .....705, 1112
Laws 1911, c. 118, p. 254 233
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Laws 1911, c. 128, p. 352 1112

(3d ed.)

§ 1438. NEBRASKA.

Declaration of public ownership.
Appropriation.
Concerning riparian rights.
Ditches on private land.
Eminent domain.
Preferences and pro-rating.
Administration.
Determination of existing priorities.
Method of appropriating.
Measurement of water—Beneficial use—Forfeiture for nonuse.
Public service—Water companies and consumers.
Mutual companies.
Federal water-rights.
Water-power.
Crimes.
Irrigation districts.
Percolating water.
Fees of State Engineer.
Miscellaneous.
Nebraska statutes construed.

References are to the Compiled Laws of 1909, section 6400 et seq.; Compiled Laws of 1903; Cobbey's Annotated Statutes; and to amendments in the Session Laws since 1905. The State Constitution contains nothing on the subject. The chief statute is that of 1895, page 224, which is said to have been substantially an adoption of the Wyoming statutes (Farmers' Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. 286). The irrigation laws are, in general terms, applicable also to power and other canals (Cobbey's Ann. Stats., sec. 6754).

References to laws of 1911 are to the file of senate bills. This is possible through the kindness of State Senator Richard Horton, who placed at our disposal a set of such as were passed. At this writing the Statutes of 1911 of Nebraska have not yet been published in official form.

Text, §§ 6, 170.

Declaration of Public Ownership.—The water of every natural stream not heretofore appropriated is declared to be the property of the public (Comp. Stats. 1903, sec. 6450; Cobbey's Ann. Stats., sec. 6796; Laws 1895, c. 69, p. 260).

Text, § 108.

Appropriation.—"The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied." (Comp. Stats. 1903, sec. 6451; Cobbey's Ann. Stats., sec. 6797; Laws 1895, c. 69, p. 260, sec. 43.)

Text, § 117.

Concerning Riparian Rights.—The courts protect the riparian rights of private land patented before the year 1889.

In the opinion of Judge Holcomb in the case of Crawford Co. v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889, decided by the supreme court of Nebraska, it is said: "The two doctrines stand side by side. They do not necessarily overthrow each other, but one supplements the other. The riparian owner acquires title to his usufructuary interest in the water when he appropriates the land to which it is an incident, and when the right is once vested it cannot be devested except by some established rule of law. The appropriator acquires title by appropriation and application to some beneficial use and of which he cannot be deprived except in some of the modes prescribed by law. The time when either right accrues must determine the superiority of the title as between conflicting claimants." It seems that the legislature of the State of Nebraska had in 1889 abrogated the common-law rule of riparian ownership in water, and substituted therefor the doctrine of prior appropriation; but it was held in the case cited that the act could not, and did not, have the effect of abolishing riparian rights which had already accrued, but only of preventing the acquisition of such rights in the future.

Text, c. 10.

Ditches on Private Land.—The right to construct any ditch, dam, etc., on another's private land, for private enterprise, or to enlarge another's ditch, or to change one's own ditch, may be obtained by condemnation under the power of eminent domain, making compensation; but no land shall be burdened with more than one ditch where enlargement of an existing ditch can be made to serve. (Cobbey's Ann. Stats., secs. 6730, 6793; Laws 1889, c. ——, p. 504, sec. 3; Laws 1911, c. ——, Sen. Bill 376.)

Text, cc. 26 and 37.

Eminent Domain.—Compiled Statutes of 1901 (article 2, section 41; article 3, section 10) authorize condemnation for irrigation. The concluding words of section 41, article 2 (which is the latter part of the first section of an act of 1877) are as follows: "Upon the filing of said petition [for condemnation] the same proceedings for condemnation of such right of way for railroad corporations, the payment of damages and the rights of appeal, shall be applicable to canals, irrigation ditches, and other works provided for in this act."

Text, § 308.

Preferences and Pro-rating.—In times of deficiency, domestic use is to be supplied first; next agricultural uses (Comp. Stats. 1903, sec. 6451). The preference to domestic uses does not extend beyond that at common law (see text, *supra*). Storage reservoirs shall not impound water during the time direct irrigation can be made from the stream. (Cobbey's Ann. Stats. 1909, sec. 6835; Amd. Stat. 1911, c. ——, Sen. Bill 236, sec. 32.)

Text, c. 49.

Administration.—The statutes upon this matter (Cobbey's Ann. Stats. 1909, sec. 6781 et seq.) were extensively amended in 1911 by Laws 1911, chapter ——, Senate Bill 236.

Water for the purpose of irrigation is declared "to be a natural want" (Comp. Stats. 1903, sec. 6473), and the works therefor are declared works of internal improvement (Comp. Stats. 1903, sec. 6456; Comp. Stats. 1909, sec. 6409 et seq.).

The general control vests in a board of irrigation (name changed by Laws 1911, c. ——, Sen. Bill 293, to "The State Board of Irrigation, Highways and Drainage"), consisting of the governor, attorney general, and commissioner of public lands (Comp. Stats. 1903, sec. 6412; Stats. 1911, c. ——, Sen. Bill 236). The governor is president *(Ibid.)*. They appoint a secretary to be called "State Engineer," to hold office for two years, who shall measure all streams and gather data, etc. (Comp. Stats. 1903, sec. 6425; Stats. 1911, *supra*.) The State Engineer may appoint an Assistant State Engineer. The State is divided into two water divisions (Comp. Stats. 1903, sec. 6409; Cobbey's Ann. Stats. 1909, secs. 6781, 6782; Amd. Laws 1911, c. ——, Sen. Bill. 236, secs. 1 and 2). and the control of each division rests in an under-secretary (now called "Superintendent," Stats. 1911, *supra*), appointed for each by the State board (Comp. Stats. 1903, sec. 6419 et seq.; Stats. 1911, *supra*). Within the divisions (which may be divided into subdivisions), the State board may, as necessity arises, create water districts, the control of which rests with an under-assistant or "water commissioner" for each district. (Cobbey's Ann. Stats. 1909, sec. 6812 et seq.; amd. by Laws 1911, *supra*, sec. 24 et seq.) The immediate duty of administering the water supply rests with these water commissioners, who may administer priorities, shut off water, make arrests, etc. (Comp. Stats. 1903, sec. 6443). Owners must maintain headgates and measuring devices for this pur-

[Administration]

pose, or the water may be shut off, and if they disobey or obstruct the officials, are punishable criminally (Comp. Stats. 1903, secs. 6443, 6445; Cobbey's Ann. Stats. 1909, secs. 6814 et seq., 6829; Stats. 1911, *supra*, secs. 26 et seq., 31). Upon April 1st of each year appropriators are to give the superintendent of the water division a list of lands to be watered, which shall be the basis of distribution by him during the year (Laws 1911, c. ——, Sen. Bill 277).

Text, c. 50.

Determination of Existing Priorities.—Priorities existing at the time of the passage of the act are to be determined as the board of irrigation shall determine (Comp. Stats. 1903, sec. 6424; Stats. 1911, c. ——, Sen. Bill 236). Priorities are to be recorded, when determined, in the office of the State board (Comp. Stats. 1903, sec. 6427; Stats. 1911, *supra*), and a certificate is to be issued to appropriators (Comp. Stats. 1903, sec. 6429). Appeal lies to court (Comp. Stats. 1903, sec. 6430 et seq.; Stats. 1911, c. ——, Sen. Bill 236, sec. 20, amending Cobbey's Ann. Stats. 1909, sec. 6804).

The rules adopted by the State Board of Irrigation in Nebraska provide that there shall be, on ten days' notice, a hearing, presided over by the secretary of the board, to receive testimony. Claimants may appear in person or by attorney, or may file claim affidavits, in which case they need not appear further. The record in the case of each claim consists of the original notice filed with the county clerk, a verified claim affidavit, any additional testimony offered, points of law, etc., submitted in writing, and the decision of the secretary. A failure to make claim constitutes an abandonment of such claim. Further rules are adopted to cover practice in matters of contest and to cover appeals.

Text, c. 18.

Method of Appropriating.—Before commencing work, application must be made to the State Board of Irrigation on a form furnished by them. This must set forth the source, amount, location of works, time required, time when actual application of the water will be made ("which time shall be limited to that required for the completion of the work when prosecuted with diligence"), purpose, and if for irrigation, the land to be irrigated; also such

[Method of Appropriating]

further details as the board may require. If approved (the application may be amended or cut down by the board, or rejected if against public welfare, or for other specified reasons, subject to appeal to court), the application is indorsed approved, the approval recorded and the application is returned to the applicant, who may then go ahead (Cobbey's Ann. Stats. 1909, sec. 6807, as amd. by Stats. 1911, c. ——, Sen. Bill 236, sec. 21). He must file a map with the board and begin work within six months (Comp. Stats. 1903, secs. 6437, 6470; Cobbey's Ann. Stats. 1909, sec. 6808; Stats. 1911, *supra*). A failure of diligence in the work results in forfeiture of the right (Comp. Stats. 1903, sec. 6470). "When the application has been perfected," the State board issues a certificate which is recorded with the county clerk (Comp. Stats. 1903, sec. 6438). Priority dates from the filing of the application *(Ibid.,* sec. 6439; Cobbey's Ann. Stats., sec. 6807; Stats. 1911, *supra).*

A similar procedure is provided for making changes later (Comp. Stats. 1903, sec. 6436). Point of diversion, or line of ditch, etc., may be changed, but require approval of the State Board of Irrigation, etc. (Laws 1911, c. ——, Sen. Bill 263).

Likewise, permit must be obtained in case water is turned from one stream into another for carriage. (Cobbey's Ann. Stats., secs. 6752, 6799; Laws 1897, c. 85, p. 359, sec. 1; Laws 1903, c. 119, p. 612.)

Some special provisions concern storage reservoirs (Cobbey's Ann. Stats. 1909, sec. 6835; Stats. 1911, c. ——, Sen. Bill 236, sec. 32). Dams over ten feet high require approval of the State board (Comp. Stats. 1903, secs. 6447, 6464; Cobbey's Ann. Stats., sec. 6792; Laws 1895, c. 69, p. 258, sec. 38).

Measurement of Water—Beneficial Use—Forfeiture for Non-use.—One cubic foot per second is the standard measurement. Fifty miner's inches are declared equal to one cubic foot per second; while the acre-foot is the standard for volume (Cobbey's Ann. Stats. 1909, sec. 6811, as amd. by Laws 1911, c. ——, Sen. Bill 236, sec. 23. See, also, Laws 1895, c. 69, p. 254, sec. 32).

Appropriations are measured by beneficial use, and water must not be wasted (Cobbey's Ann. Stats. 1909, secs. 6797, 6799, as amd. by Laws 1911, c. ——, Sen. Bill 236, secs. 17 and 19). April 1st to November 15th is declared the irrigating season (Cobbey's

[Measurement of Water—Beneficial Use—Forfeiture for Nonuse]

Ann. Stats. 1909, sec. 6825, amended in Laws 1911, c. ——, Sen. Bill 236, sec. 30). No allotment for irrigation shall exceed one cubic foot per second for each seventy acres of land nor three acre-feet in the aggregate per acre per year, except that areas under forty acres may have, for a limited time, such additional flow as is needed to supply a head, etc., to carry the water and distribute it on the land (Cobbey's Ann. Stats. 1909, sec. 6799, as amd. by Laws 1911, c. ——, Sen. Bill 236, sec. 19). No allotment for storage shall exceed for irrigation three acre-feet per acre per year (*Ibid.*, sec. 6835, as amd. by *Ibid.*, sec. 32).

Three years' nonuse causes loss of right, and forfeiture for nonuse may be declared by the board of irrigation after notice to show cause, and the sworn report of the water officials is *prima facie* evidence of the forfeiture. Appeal lies to court (Stats. 1911, c. ——, Sen. Bill 236, sec. 17, amending Cobbey's Ann. Stats. 1909, sec. 6797).

Text, Part VII.

Public Service—Water Companies and Consumers.—Regarding compulsory service, see Statutes of 1895, chapter 69, page 261, sections 46, 57; Cobbey's Annotated Statutes of 1909, section 6825 et seq.; Amended Laws of 1911, chapter ——, Senate Bill 236, section 30 et seq.

Foreclosure of mortgage on a company's plant shall not affect rights of consumers (Cobbey's Ann. Stats., sec. 6817; Laws 1895, c. 69, p. 267, sec. 63).

"The owner or operator of any works for the storage, carriage or diversion of water must deliver all water legally appropriated to the parties entitled to the use of the water for beneficial purposes, at a reasonable rate, to be fixed by the State Railway Commission, according to the law in such cases relating to common carriers" (Laws 1911, c. ——, Sen. Bill 328).

Mutual Companies.—"Any corporation or association organized under the laws of this State for the purpose of constructing and operating canals, reservoirs and other works for irrigation purposes and deriving no revenue from the operation of such canal, reservoir or works, shall be termed a mutual irrigation company, and any by-laws adopted by such company prior to, or after the passage of this act, not in conflict herewith, shall be deemed lawful

[Mutual Companies]
and so recognized by the courts of this State; provided, such by-laws do not impair the rights of one shareholder over another." (Cobbey's Ann. Stats., sec. 6820; Laws 1895, c. 69, p. 268, sec. 66.)

Federal Water-rights.—Right of way is granted to the United States over State lands (Cobbey's Ann. Stats., sec. 6891; Laws 1905, p. ——, sec. 1). Concerning water users associations, see *Ibid.*, section 6894. The United States Reclamation Service may appropriate water, and if in excess of the needs of Federal projects, any surplus may be furnished by the service to other appropriators, the terms of service to rest with the United States, and supervision of delivery to rest with the State Engineer (Laws 1911, c. ——, Sen. Bill 264). Appropriations by the United States require application to the State board like other appropriators (Laws 1911, c. ——, Sen. Bill 236, sec. 21, amending Cobbey's Ann. Stats. 1909, sec. 6807).

Water-power.—"Any canal constructed for the purpose of developing water-power, or any other useful purpose, and from which water can be taken for irrigation, is hereby declared to be an irrigation canal, and all laws relating to irrigation canals shall be deemed applicable thereto." (Stats. 1893, c. 40, p. 378; Cobbey's Ann. Stats., sec. 6754.)

Crimes.—Wasting artesian well water is subject to a fine (Comp. Stats. 1903, sec. 6407). Disobeying officials is a misdemeanor (Comp. Stats. 1903, sec. 6407). Damaging works or stealing water is a crime (Comp. Stats. 1903, sec. 6458; Cobbey's Ann. Stats., sec. 6804); and there are numerous other police regulations.

Text, c. 58.
Irrigation Districts.—Irrigation districts based upon the Wright Act of California are provided in Laws of 1895, chapter 70, page 270; 1903, chapter 121, page 616; 1903, chapter 123, page 625; Compiled Statutes of 1903, section 6476 et seq.; Cobbey's Annotated Statutes, section 6822 et seq.; amended by Statutes of 1905, chapters 165, 166, page 648 et seq.; amended by Statutes of 1909, pages 558–572 (several acts); Compiled Laws of 1909, section 6476 et seq.; Cobbey's Annotated Statutes of 1909, chapter 26.

[Irrigation Districts]

Amendments to the irrigation district laws in 1911 were extensive. Among others, Senate Bill 190 declares unauthorized indebtedness incurred by the officers to be void, and provides for drainage of lands in the district (amending Cobbey's Ann. Stats. 1909, sec. 6877); Senate Bill 191 amends Cobbey's Annotated Statutes of 1909, section 6855, by allowing exclusion of lands which, because of subirrigation, no longer need the water; Senate Bill 192 amends Cobbey's Annotated Statutes of 1909, section 6879, regarding the furnishing of water to the irrigators; Senate Bill 193 amends Cobbey's Annotated Statutes of 1909, section 6856, regarding regular meetings of board of directors during the irrigation season; Senate Bill 225 makes irrigation districts liable (after notice) for negligence in delivering or failing to deliver water.

Text, Part V.

Percolating Water.—"That it shall be unlawful for any owner or owners, lessee or lessees, occupier or occupiers, foreman or superintendent of any farm, town lot or other real estate in the State of Nebraska where artesian water has been found or may be found hereafter, to allow the water from wells or other borings or drillings on any farm, town lot or other real estate in Nebraska to flow out and run to waste in any manner to exceed what will flow or run through a pipe one-half of one inch in diameter, except where the water is first used for irrigation, or to create power for milling or other mechanical purposes." (Cobbey's Ann. Stats., sec. 6888 et seq.)

Fees of State Engineer.—By Statutes of 1911, chapter ——, Senate Bill 236, section 34, Cobbey's Annotated Statutes of 1909, section 6918, was amended to read as follows:

"There shall be paid to the State Board of Irrigation, Highways and Drainage in advance for the services of the secretary, by the party demanding or necessitating the service, the following fees: For filing, recording and examining each application for a storage reservoir for each five thousand acre-feet or fraction thereof, five dollars; for filing, recording and examining each application for water for irrigation for each thousand acres of land or fraction thereof, five dollars; for filing, recording and examining each application for water for power purposes, for each theoretical fifty horse-power or fraction thereof, five dollars; for filing, recording and examining each application for water for each fish-pond, ice-pond or other useful purpose for which no fee has been fixed, five dollars; for filing any petition, affidavit or other paper, fifty cents; for recording any instrument other than an application, one dollar for the first one hundred words and for each additional hundred words, fifteen cents, and fifty cents per hour for copying drawings in connection therewith; for making copy of any instrument recorded or filed in the office of the State board, fifteen cents for each hundred words; for blue-print copy of any map or drawing, ten cents per square foot; for other copies of drawings, fifty cents per hour for the time actually employed; for the examination of plans for any proposed dam, fifty cents for each foot in height, and actual expenses while visiting and examining the site thereof; for certificate and seal, one dollar. The secretary of the State board shall keep a record of all money thus received,

[Fees of State Engineer]

and at the end of each calendar month shall pay the same to the State treasurer for the use of the general fund and take his receipt therefor, and file the same with the records of his office."

See, also, Stats. 1905, c. 167, p. 652.

Miscellaneous.—Ditches for utilizing waste, seepage, swamp or spring waters are to be governed by the same laws as ditches using waters of natural streams (Comp. Stats. 1903, sec. 6452; Cobbey's Ann. Stats., sec. 6798; Laws 1895, c. 69, p. 260, sec. 44). Concerning drainage districts, see Laws of 1907, page 474; Laws of 1909, page 247; Laws of 1909, page 530. Drainage of lakes requires approval of State Board of Irrigation (Laws 1909, p. 525). Concerning water-main districts, see Laws of 1907, page 136. Concerning city waterworks, see Laws of 1907, page 120. Concerning appropriations on State lands, see Laws of 1907, page 437. The law of appropriation is declared applicable to State lands (Comp. Stats. 1903, sec. 6448; Stats. 1907, p. 437). Ditches may cross highways (Cobbey's Ann. Stats. 1909, secs. 6819, 6837, as amd. 1911, c. ——, Sen. Bill 236, secs. 29, 33).

Irrigation works are exempt from taxation (Cobbey's Ann. Stats., sec. 6815; Laws 1895, c. 69, p. 266).

Appropriations may be made to get additional water, in times of scarcity, for land for which water has already been appropriated, but is insufficient (Laws 1911, c. ——, Sen. Bill 266). A repeal of Cobbey's Ann. Stats. 1909, sec. 6823, was made by Laws of 1911, c. ——, Sen. Bill 262.

Nebraska Statutes Construed.—In the earlier parts of this book (Parts I to VII, inclusive) Nebraska Statutes are construed or cited upon the following pages:

Constitution.

Art. 1, sec. 21 921
Art. 3, sec. 15 ..... 1161, 1166, 1181

Compiled Statutes.

Comp. Stats., sec. 6429 1117
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Comp. Stats. 1903, sec. 6407 .....733, 1072, 1100
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Comp. Stats. 1903, sec. 6425 1098
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§ 1439. NEVADA.

Declaration of State ownership.
Concerning riparian rights.
Determination of existing priorities.
Method of appropriating.
Fees of State Engineer.
Duty and measurement of water.
Public service—Water companies and consumers.
Crimes and police regulations.
Irrigation districts.
Miscellaneous.
Nevada statutes construed.

References are to the Compiled Laws of 1900, section 354 et seq.; Session Laws of 1901 (page 73), 1903 (page 18), 1905 (pages 66, 93, 193, 197), and Laws of 1909 and 1911. There is nothing in the State Constitution. The laws of 1903 and 1905 were repealed in 1907, chapter 18, page 30, and a new code substituted. Extensive changes proposed in 1911 did not pass. The act of 1903 had applied only to adjudication of existing rights; that of 1905 added a method of making new appropriations; the amendments of 1907 and 1909 applied to matters of detail. There were no changes of importance in 1911. (A new compilation of Nevada's laws is now in preparation, Stats. 1911, c. 126.)

Nevada is reconstructing her laws concerning water in order to advance irrigation. The law of appropriation was originally established in Nevada, and the law of riparian rights rejected *in toto*, by the decisions of the courts independent of legislation, and this is the basis of Nevada's present laws. Water is scarce in Nevada. The lands are susceptible of excellent culture where water can be had, but Nevada is mostly a series of dry, waterless deserts separated by bare mountains. Hitherto the mountain ranges with their great mines have furnished the paramount industry in Nevada, but now the energies of the State are turning to the development of the valleys by means of irrigation. Everything is being done to aid the national government in its plans under the act of Congress of June 17, 1902, and the work of building irrigation systems is proceeding on a large scale. The recent mining development in Nevada has caused every little stream of water, however small, to be of great value, if not for irrigation, for mining, milling or domestic use.

Text, §§ 6, 170.

Declaration of State Ownership.—"All natural watercourses and natural lakes and the waters thereof which are not held in private ownership belong to the State, and are subject to regulation and control by the State" (Comp. Laws 1900, sec. 354. To

[Declaration of State Ownership]

the same effect, Stats. 1907, p. 30, sec. 1). All waters not held in private ownership are declared (by Stats. 1903, p. 24, sec. 1) to "belong to the public," and the use thereof is a public use.

Text, § 118.

Concerning Riparian Rights.—The right to waters can arise only by the method prescribed in the statutes, which is the method of appropriation (Comp. Laws 1900, sec. 359). The Statute of 1907 (page 30, section 7) says: "The prior right to the use of the unappropriated waters of the natural watercourses and natural lakes, as defined in this act, may be acquired in the manner provided in this act and not otherwise." Riparian rights are not expressly mentioned in any of the statutes. The Statute of 1903 (page 24, section 1) provides "beneficial use shall be the basis, the measure, and the limit of the right," a common phrase in the States rejecting the California doctrine, of which Nevada is one. The Statute of 1907 (page 30, section 2) saves, however, all existing rights to water, "whether acquired by appropriation or otherwise."

The court follows the Colorado system rejecting riparian rights *in toto*.

Text, c. 49.

Administration.—There is a State board of irrigation, consisting of the governor, surveyor general, and attorney general of Nevada (Stats. 1901, p. 72; Stats. 1907, p. 30, sec. 21, adding the State Engineer as a member, to be its secretary). This board shall subdivide the State into water subdivisions, divisions and districts (Stats. 1907, p. 30, sec. 22), and appoint water commissioners, whose duty shall be to administer and apportion the water according to priority (Stats. 1907, p. 30, sec. 20). Four districts have been established in Carson Valley. The board of irrigation shall make such rules and fix such penalties as it shall deem advisable (Stats. 1903, p. 18; Stats. 1905, p. 66). The State Engineer, appointed by the governor (Stats. 1907, p. 30, sec. 8), is in effect given power of keeping a general lookout over all waters in the State (Stats. 1903, p. 18, sec. 5; Stats. 1907, p. 30, sec. 10; Stats. 1909, c. 31, p. 31), and shall co-operate with the United States Reclamation Service *(Ibid.)*. Any person obstructing the officials in these matters is guilty of a misdemeanor (Stats. 1907, p. 30; Stats. 1903, p. 18, sec. 20. See, also, Comp. Laws 1900,

[Administration]

secs. 361, 373, possibly repealed by Stats. 1903, p. 18). Owners must install headgates when ordered by State Engineer; failure to do so is a crime, and the State Engineer may put them in at the owners' expense (Stats. 1909, p. 86).

Text, c. 50.

Determination of Existing Priorities.—The State Engineer shall prepare for each stream in the State of Nevada a list of existing appropriations according to priority. For this purpose he shall send blanks to existing claimants to be filled out and sworn to (failure of claimant for ninety days to file statement is a crime, Stats. 1907, p. 30, sec. 16), and existing decrees of courts shall be collected. An examination shall be made and record and maps prepared by the State Engineer (in 1905–06, maps were made of about 150,000 acres on Carson, Walker, Truckee and Humboldt Rivers), who shall prepare from these data a list of priorities and within thirty days thereafter issue certificates of priority. The list shall be recorded with the county recorder. Within one year parties aggrieved may bring an action against the State Engineer and others in court. Expert engineers shall be employed by the court and not by the parties. From the recorded list the water commissioners shall administer the water (Stats. 1903, p. 18; Stats. 1907, p. 30, sec. 14 et seq.). In 1905–06 three hundred and seventy-six certificates were issued and recorded on Carson River, and no appeals were taken.

Text, c. 18.

Method of Appropriating.—(Stats. 1905, p. 66; Stats. 1907, p. 30, sec. 24 et seq.) Application must be made to State Engineer, containing details of plan, etc., and any additional facts required by the State Engineer, in a form prescribed by him, and he shall record date of filing with him. He may send it back for correction, and must cancel it if not returned corrected within sixty days (Stats. 1907, p. 30, sec. 25; amd. 1909, p. 31). In some newspaper, if the application is satisfactory, the State Engineer publishes (once a week for four weeks at expense of applicant, Stats. 1907, p. 30, sec. 25) a notice of the application "showing by whom made, the quantity of water sought to be appropriated; the stream from which the appropriation is to be made and at what point on the stream; the use for which it is to be appropriated, and by what

[Method of Appropriating]

means, which notice shall be published once a week for four weeks." (The quotation is from the statute of 1905.) Within thirty days after completion of publication written protest may be filed with State Engineer, who shall fix a time for hearing, not less than fifteen days after filing the protest, and who may take such action at the hearing as he deems proper (Stats. 1907, p. 30, sec. 25; amd. 1909, p. 31). "But vested rights to the use of such waters shall in nowise be lost, prejudiced or impaired by failure to protest against an application to appropriate the same under this act" (Stats. 1907, p. 30, sec. 25; Stats. 1909, p. 31). If the application is approved by him, he shall return it indorsed to applicant, amended or cut down, if necessary (subject to suit against him in court within sixty days after the indorsement, Stats. 1907, p. 30, sec. 27). The State Engineer must refuse permit where there is no water, or where it would injure others, and going on after rejection is a crime (Stats. 1907, p. 30, secs. 26, 27; Stats. 1909, p. 31). The appropriator must file an affidavit within thirty days after time required by the permit for commencement of work, stating what work he has so far done, and within six months after issuance of permit, must file a map with the State Engineer (Stats. 1907, p. 30, secs. 26, 28; amd. 1909, p. 31). Time for beginning and completing work is left to the discretion of the State Engineer (Stats. 1907, p. 30, sec. 26). "Upon satisfactory proof being made to the State Engineer that any application to appropriate water has been perfected in accordance with the provisions of this act, said State Engineer shall issue to the applicant a certificate setting forth the name of the appropriator, date, source, purpose and amount of the appropriation, and if for irrigation, a description of the land to be irrigated, which certificate shall within thirty days after its issuance be recorded in the county in which the point of diversion of the appropriation is, as well as in the county where the water is used, in books specially kept for that purpose, and the fee for such records shall be one dollar ($1), payable by the party in whose favor the certificate is issued. The priority of such new appropriation shall date from the filing of the application in the State Engineer's office" (Stats. 1907, p. 30, sec. 29. See, also, Stats. 1905, p. 66. The quotation is from the statute of 1907).

[Method of Appropriating]

The priority of such appropriation shall date from the filing of the application in the State Engineer's office. (See Comp. Laws 1900, secs. 425–429, possibly repealed by Stats. 1903, p. 18; Stats. 1907, p. 30, sec. 29.)

During May, 1905, to December, 1906, there were 325 applications, being from almost every county in the State; 54 were protested, 44 rejected, 42 perfected, and 130 remained under consideration on December 31, 1906. (Report of State Engineer for 1905–06.)

Fees of State Engineer.—Statute of 1909, page 31, adding section 26a to the Statutes of 1907, page 30, is as follows:

"1. For filing application for permit, twenty-five dollars ($25), which shall include the expense of publication and the issuance of such permit, if the same shall issue, and such expense of publication is hereby fixed at the sum of ten dollars ($10), which sum shall be paid on the certificate of the State Engineer, approved by the State Board of Examiners, and the State Controller shall draw his warrant on the State Treasurer for the payment of such expense of publication. 2. For filing proof of beneficial use, two dollars, which shall include certificate thereof, if the same shall issue. 3. For filing each transfer, agreement, assignment, waiver, release, relinquishment, deed, affidavit (other than affidavit of proof of appropriation) or other paper, one dollar ($1). 4. For copying papers on file or of record in his office, ten cents (10c) per folio, and for each certification under seal fifty cents (50c). All fees collected under the provisions of this act by the State Engineer shall be paid by him into the State treasury at least once in each month, and the same shall become a part of the general fund; and at the time of such payment the State Engineer shall deliver to the State Treasurer an itemized account, duly certified by him, showing the names of the persons by whom such fees are paid, and the purposes for which such payments were made."

Text, §§ 486, 487.

Duty and Measurement of Water.—The maximum used to irrigate one acre was fixed at three acre-feet per year per acre in the Statutes of 1903, page 18. This was repealed in the Statutes of 1905, page 66, but re-enacted in Statutes of 1907, page 30, section 5. The standard of measurement is one cubic foot per second. (Comp. Laws 1900, sec. 360; Stats. 1907, p. 30, sec. 6.) The Statutes of 1907, page 426, and 1911, chapter 141, provide for an investigation of the duty of water in irrigation.

The following amendment was passed in 1909:

"The maximum quantity of water which may hereafter be appropriated for irrigation purposes in the State of Nevada, shall be as follows: In all parts of the State where water cannot be beneficially used for irrigation for a greater period than six months each year, the maximum quantity appropriated for each acre shall not exceed three (3) acre-feet per annum. In all parts of the State where water is beneficially used for irrigation for a period of nine months or more in each year, the maximum quantity of water that may be appropriated shall not exceed three (3) acre-feet for the five months

[Duty and Measurement of Water]

beginning May 15th and extending to October 15th of each year, for each acre of land supplied, and the maximum quantity of water that may be appropriated for each acre during the remainder of each year shall not exceed one-half of one acre-foot multiplied by the number of months of each year other than the five months hereinbefore named, during which water is so beneficially used." Stats. 1909, p. 31, amending section 5 of the Act of 1907, p. 30.

Public Service.—A public service commission is created in Statutes of 1911, chapter 162.

Crimes and Police Regulations.—Pollution of streams with substances injurious to health of persons, fish or livestock is made a misdemeanor (Stats. 1903, p. 214). Interfering with State Engineer is a misdemeanor (Stats. 1903, p. 18, sec. 20). Diverting water to waste it is a misdemeanor (Comp. Laws 1900, secs. 430, 431). Willfully obstructing flow of stream is a misdemeanor (Comp. Laws 1900, secs. 432–434). Throwing sawdust into a stream is a misdemeanor, even though the stream is not wholly within the State (Comp. Laws 1900, secs. 4879, 4881). Pollution is a misdemeanor, excepting quartz-mills or ore reduction works (Stats. 1907, p. 104; Stats. 1911, c. 56). Throughout the irrigation acts are numerous criminal provisions in the nature of police regulations, such as interfering with the water officials (Stats. 1903, p. 18, sec. 20; Stats. 1907, p. 30, sec. 30); or failing to maintain headgates (Stats. 1909, p. 86); or injuring water structures (Stats. 1909, p. 48).

Text, c. 58.

Irrigation Districts.—Irrigation districts based on the Wright Act of California are provided in Compiled Laws of 1900, sections 374–423. A new irrigation, drainage and water-storage district act was passed in 1911 (Stats. 1911, c. 134).

Miscellaneous.—"There is no absolute property in the waters of a natural watercourse or natural lake. No right can be acquired to such waters except a usufructuary right—the right to use it, or dispose of its use for a beneficial purpose" (Stats. 1907, p. 30, sec. 3). The quantity appropriated does not extend beyond what can be economically used and surplus must be returned to the stream *(Ibid.*, sec. 4).

All appropriations for irrigation are appurtenant to the land irrigated, and can be separated therefrom only by becoming appur-

[Miscellaneous]

tenant to other land for irrigation by transfer after approval of the State Engineer and publication of notice, subject to review in the district court (Stats. 1905, p. 66. But see Stats. 1907, p. 30, sec. 26). "Any person changing his place of diversion or manner of use as specified in this act, shall not thereby lose any priority of right upon the stream he may have heretofore acquired" (Stats. 1907, p. 30, sec. 26; amd. 1909, p. 31).

Co-operation with the irrigation plans of the United States in general is provided for in Statutes of 1901, page 72; Statutes of 1903, page 18; Statutes of 1905, pages 66, 93, 197; Statutes of 1907, page 30. (See Stats. 1911, c. 205, p. 440, repealing the act of March 16, 1905.) And State lands are made subordinate to the Federal plans (Stats. 1905, p. 93).

General provisions similar to California Civil Code, 1410–1422, are contained in Compiled Laws, sections 356–358 and 424. To a large extent the later statutes supersede these provisions. Statutes of 1909, pages 91 and 247, contain a definition of what constitutes a ditch.

Regarding the Carey Act, see Statutes of 1911, chapter 76 (also Statute of March 23, 1909), accepting the grant; Statutes of 1911, chapter 205, page 439, repealing an act of March 6, 1901. See, also, Statutes of 1911, page 452, saying the first million acres have been taken up by projects, and asking Congress for the same amount additional.

A resolution of 1911 (Stats., p. 453) replies to the California resolution concerning the waters of Lake Tahoe, "whose claim to those waters we do not concede."

Nevada occupies a unique position in its treatment of the law of waters. It is now one of the staunchest supporters of the Colorado system, rejecting the common law of riparian rights and upholding the State property view and the law of appropriation as the sole rule governing waters. But formerly the court held the other way, and it was on the Nevada case of Van Sickle v. Haines, 7 Nev. 249, 15 Morr. Min. Rep. 201, that the California court greatly relied in Lux v. Haggin, 69 Cal. 255, 10 Pac. 674, in establishing the California doctrine recognizing riparian rights. Nothing could be more vehement in support of the California doctrine than the opinion of Chief Justice Lewis in the Van Sickle case, wherein he said:

"Although it has sometimes been suggested that the unoccupied lands belong to the several States in which they may be located, the suggestion has never received the serious sanction of statesmen, or the courts of the country. . . . . If, as we have shown, the water naturally flowing through land is an incident or part of the land itself, whence the authority in a State court to hold that such incident does not attach to the land belonging to the United States? It might as well be argued, and, indeed, it can be maintained with as much plausibility, that it has not the right to the grow-

[Miscellaneous]

ing timber upon it, which is not more a feature of the soil itself than a natural watercourse running through it. . . . .

"It might as well be said that the courts can deprive him of the land itself by holding that it did not pass by the patent, as to rule so respecting that which is universally admitted and held to be an inseparable and valuable incident to it. There is no rule of law that would not be more applicable to our condition than that which would simply justify judicial robbery."

Nevertheless, the Nevada court, in Reno etc. Works v. Stevenson, 20 Nev. 269, 19 Am. St. Rep. 364, 21 Pac. 317, 4 L. R. A. 60, declared that the common law of riparian rights was utterly unsuited to conditions in Nevada, and does not exist there (as quoted in the text). In a later case (Ronnow v. Delmue, 23 Nev. 29, 41 Pac. 1074) it was declared that "otherwise the right to the use of water would rest upon a very frail foundation." And in another case upon the subject the court was very emphatic, saying:

"The doctrine of riparian rights is so unsuited to the conditions existing in the State of Nevada, and is so repugnant in its operation to the doctrine of appropriation, that it is not part of the law, and does not prevail here." (Walsh v. Wallace, 26 Nev. 299, 99 Am. St. Rep. 692, 67 Pac. 914). And in a more recent case:

"As time passes it becomes more and more apparent that the law of ownership of water by prior appropriation for a beneficial purpose is essential under our climatic conditions to the general welfare, and that the common law regarding the flow of streams which may be unobjectionable in such localities as the British Isles and the coast of Oregon, Washington, and northern California, where rains are frequent and fogs and winds laden with mist from the ocean prevail and moisten the soil, is unsuitable under our sunny skies, where the lands are so arid that irrigation is required for the production of the crops necessary for the support and prosperity of the people. Irrigation is the life of our important and increasing agricultural interests, which would be strangled by the enforcement of the riparian principle." Twaddle v. Winters, 29 Nev. 88, 85 Pac. 280.

The Nevada court has been sharply criticised for this change of position (in Farnham on Waters, sec. 654), but it paved the way for the statutes above given.

Nevada Statutes Construed.—In the earlier parts of this book (Parts I to VII, inclusive) Nevada Statutes are construed or cited upon the following pages:

Session Laws.

Stats. 1861, p. 21, sec. 77 74
Stats. 1889, p. — 1037
Stats. 1901, p. 72 ..... 1097, 1099, 1276, 1309
Stats. 1903, p. 18, sec. 2 ..... 523, 733, 1098, 1100, 1117, 1276, 1309
Stats. 1903, p. 24, sec. 1 ..... 194, 504
Stats. 1903, p. 214 733
Stats. 1905, p. 66 ..... 296, 523. 551, 1276, 1309
Stats. 1905, p. 73 ..... 1276, 1309, 1319
Stats. 1905, p. 197 ..... 1276, 1309
Stats. 1907, p. 30 ..... 20, 153, 154, 194, 298, 445, 453, 503, 504, 521, 523, 530, 542, 551, 697, 733, 1097, 1099, 1100, 1103, 1104, 1117, 1276, 1309
Stats. 1907, p. 104 733
Stats. 1909, p. 31 ..... 154, 296, 450, 523, 530, 698

Session Laws—Continued.

Stats. 1909, p. 48 733
Stats. 1909, p. 86 1100
Stats. 1909, p. 91 480
Stats. 1909, p. 247 480
Stats. 1911, c. 76 1266
Stats. 1911, c. 134 ..... 379, 1262
Stats. 1911, c. 162 ..... 1186, 1190, 1197
Stats. 1911, c. 205, p. 439 1266
Stats. 1911, c. 205, p. 440 1270
Stats. 1911, p. 452 1266
Stats. 1911, p. 453 365

Compiled Laws.

Comp. Laws 1900 521
Comp. Laws 1900, secs. 324–423 1262
Comp. Laws 1900, sec. 354 ..... 194, 1097, 1166
Comp. Laws 1900, sec. 356 387
Comp. Laws 1900, sec. 359 153
Comp. Laws 1900, sec. 424 387
Comp. Laws 1900, secs. 430–434 ..... 733, 1100
Comp. Laws 1900, sec. 431 1100
Comp. Laws 1900, sec. 4879 733
Comp. Laws 1900, sec. 4881 733

(3d ed.)
§ 1440. NEW MEXICO.

Declaration of public ownership.
Appropriation.
Concerning riparian rights.
Administration.
Determination of existing priorities.
Method of appropriating.
Duty and measurement of water.
Eminent domain.
Miscellaneous.
Irrigation law of 1907.
Irrigation districts.
Miscellaneous.
New Mexico statutes construed.

References are to Laws of 1905, page 270, chapter 102 (repealed in Laws of 1907, p. 71, c. 49), Laws of 1905, page 284, chapter 104, and Laws of 1907, page 71, chapter 49, with amendments in Laws of 1909. There was no legislative session in 1911. Previous to these statutes, the laws of New Mexico were, in this connection, contained in the Revised Statutes of 1903, chapter 44.

Constitution.—The Constitution of 1910 (not yet, however, ratified by Congress) contains the usual provisions protecting private property, and regarding eminent domain. With reference to irrigation and to water-rights, article 16 is as follows:

"Section 1. All existing rights to the use of any waters in this State for any useful or beneficial purpose are hereby recognized and confirmed.

"Sec. 2. The unappropriated water of every natural stream, perennial or torrential, within the State of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the State. Priority of appropriation shall give the better right.

"Sec. 3. Beneficial use shall be the basis, the measure and the limit of the right to the use of water.

"Sec. 4. The legislature is authorized to provide by law for the organization and operation of drainage districts and systems."

Text, §§ 6, 170.

Declaration of Public Ownership.—All waters are declared to belong to the public (Stats. 1907, c. 49, p. 71, sec. 1).

Appropriation.—Priority shall govern rights in water (Stats. 1907, c. 49, sec. 2).

Text, § 118.

Concerning Riparian Rights.—The statute (Stats. 1905, p. 270) contains the usual provisions that no one shall be denied the right

[Concerning Riparian Rights]

to appropriate (sec. 1); that beneficial use shall be the basis, the measure and the limit of all rights to the use of water (sec. 26; Stats. 1907, c. 49, p. 71, sec. 2); that priority gives the better right (sec. 2). The courts follow the Colorado system, rejecting the common law of riparian rights *in toto*.

Text, c. 49.

Administration.—The office of Territorial Irrigation Engineer is created with the usual duties and powers (Stats. 1907, p. 71, sec. 4 et seq.). The statute of 1905 divides the territory into six specified water divisions, with one water commissioner for each (Stats. 1905, sec. 23). A board of control is established consisting of the Territorial Irrigation Engineer and the water commissioners (Stats. 1905, sec. 24). The general supervision is in the Territorial Engineer (Stats. 1907, p. 71, secs. 4 et seq., 12).

Text, c. 51.

Determination of Existing Priorities.—The determination rests with the board of control, subject to review in court (Stats. 1905, sec. 29). The Territorial Irrigation Engineer makes a survey after due notice, and takes all available testimony (Stats. 1905, sec. 29 et seq.). Provisions are made for contests (Stats. 1905, sec. 33 et seq.). The board of control issues a certificate, one copy of which is recorded with the county clerk and the other in the office of the Territorial Irrigation Engineer (Stats. 1905, sec. 36). This system in the Statute of 1905 is replaced in the Statute of 1907, page 71, section 19 et seq., by proceedings in court at suit of attorney general.

Text, c. 18.

Method of Appropriating.—A general method applicable to all pursuits was established in chapter 104 of the Laws of 1905. This consists in filing notice in the office of the probate clerk of the county where the stream lies, and resembles more the original method as in force in California than it does the new method under the water codes. The work must begin within six months after filing notice and be completed within eighteen months. *(Ibid.)* Application to the Territorial Engineer is not required except in cases of dams and dikes (sec. 19 of c. 102), and not even in those if the cost of the work is to be less than $2,000 (sec. 19), and even where required, the Territorial Engineer has much

[Method of Appropriating]

discretion to waive requirements in favor of projects which he does not consider of great importance (sec. 19). This would seem the only one of the recent statutes which keeps in view those who intend to appropriate water only on a small scale.

The statute of 1907, below given, provides the usual water code procedure.

Text, §§ 486, 487.

Duty and Measurement of Water.—The second-foot and the acre-foot are the units for time and volume respectively (Stats. 1905, sec. 3); and the miner's inch is declared equal to one-fiftieth of the second-foot (Stats. 1905, sec. 3). The maximum allowed for irrigation shall be one second-foot for seventy acres irrigated (Stats. 1905, sec. 4).

Text, c. 26.

Eminent Domain.—Laws of 1907, page 71, section 3.

Miscellaneous.—Fees of the Territorial Engineer are to be fixed by the board of control (see Stats. 1907, p. 71, sec. 9, concerning fees). Nonuser for four years causes forfeiture of right (Stats. 1905, sec. 5). An unusual provision is that waterworks for private use are exempt from taxation (Stats. 1905, sec. 8).

Text, c. 49.

Irrigation Law of 1907.—Only thirty-two notices were filed under the laws of 1905. The laws of 1905 were replaced in 1907, and a code adopted, based on the draft of Mr. Bien, of the Reclamation Service, and resembling the codes of North and South Dakota and Oklahoma. Some references to this statute are included in the above analysis, and we add herewith the table of contents of the statute of 1907.

An act to conserve and regulate the use and distribution of the waters of New Mexico; to create the office of Territorial Engineer; to create a board of water commissioners, and for other purposes. H. B. No. 120. Approved March 19, 1907.

Sec. 1—All natural waters in New Mexico belong to public. Sec. 2—Beneficial use basis of measurement of right to use water. Right to be governed by priority. When to date. Sec. 3—Who may exercise right of eminent domain to acquire rights of way for ditches, etc. Engineers of U. S., Territory and others may enter upon public and private lands, when. Liability for damage. Sec. 4—Creating office of Territorial Engineer. How appointed. Term of office. Subject to removal for cause. Duties. Salary, etc. Office, where. Not to engage in private practice, except. Sec. 5—May employ assistants. Sal-

[Irrigation Law of 1907]

aries and expenses, how paid. Sec. 6—To give bond and take oath. Sec. 7—Claim for services, how paid. Sec. 8—Yearly report to governor. When to be rendered and what to include. Sec. 9—Fees to be received by Territorial Engineer. Sec. 10—Records of office public. What to consist of. Sec. 11—Territorial Engineer to make rules necessary. Sec. 12—Engineer to have supervision of apportionment of water in Territory. Sec. 13—Territory to be divided into stream systems. Sec. 14—Engineer to appoint water-masters. Duties. Number. Sec. 15—Appeal from decision of water-master. How made and to whom. Sec. 16—Rate of pay for water-master. How paid. Sec. 17—Report of water-master. To whom and what to consist of. Sec. 18—Engineer to assist county commissioners in miscellaneous work. Sec. 19—Engineer to make hydrographic surveys. Sec. 20—Attorney general to institute suit when and for what purpose. Proviso. Sec. 21—Procedure in suits for determination of water-rights. May be submitted to jury or referee. Sec. 22—Appropriation "Hydrographic Survey Fund." Sec. 23—Copy of decree to be filed in office of engineer. Contents of decree. Sec. 24—Method of making application, etc., for water-right. Engineer may require additional information, when. Excess of water. Sec. 25—Date of application to go on record. If application is defective as to form, method of correction. Conditions governing priority rights. Proviso. Sec. 26—Mode of procedure if application is correct. Publication of notice. Proof of publication to be filed. Sec. 27—Further steps necessary to secure water-rights. Proviso. Sec. 28—When engineer may reject application. Sec. 29—Time in which work must be completed. Proviso. Sec. 30—Inspection of completed work. When and how. Proviso. Sec. 31—Certificate of approval. When issued. Sec. 32—If works unsafe, engineer to notify. Fees for inspection, how and by whom to be paid. Proviso. Sec. 33—Misdemeanor to use works, etc., until notice is received by engineer that same are or have been made safe. Sec. 34—Inspection of completed work. How and when made. Sec. 35—Time may be extended. How and length of time. Sec. 36—Permit may be assigned. Binding if recorded. Proviso. Sec. 37—Question of fact may be submitted to jury in suit. Sec. 38—Legal advisers of Territorial Engineer. Sec. 39—When water in excess is used or stored, owner required to deliver to other on application. Sec. 40—If United States notified that water is to be utilized, no applications to be considered. Proviso. Sec. 41—Standard of measurement. Sec. 42—When party securing permit forfeits. Sec. 43—Limitations of amount of water to be allowed. Sec. 44—Water appurtenant to land cannot be transferred. Proviso. Applicant to publish notice. Sec. 45—Method of changing use of water already secured. Sec. 46—Ditch-owners to construct and maintain measuring devices. Penalties for disturbing same. Sec. 47—Various acts constitute misdemeanors. Engineer or authorized assistant may make arrest. Duties. Engineer and assistants may enter on public and private property for carrying out their duties. Sec. 48—Unauthorized use of water a misdemeanor. Sec. 49—Owners to construct bridge. County commissioners may construct and collect cost. Sec. 50—Unlawful to place or maintain obstructions in ditch. Sec. 51—Penalties for violations of sections of this act. Sec. 52—Liens in this act superior to other encumbrances. Sec. 53—In case of seepage, others may apply for water—When. Sec. 54—Rights of way granted for ditches, etc. Sec. 55—Conditions under which land may be transferred from Territory to other in future. Lands granted to U. S. without charge. Sec. 56—Appropriation for salaries, etc. Sec. 57—Local customs and rules to stand. Sec. 58—When water-masters are to be appointed. Sec. 59—This act not to impair existing vested rights. Sec. 60—Transfer of water from one stream to another. When permissible, and manner of replacement. Sec. 61—When works enlarged, party doing work to enjoy benefit. Sec. 62—Board of water commissioners created. Must take oaths. Date of meetings. Sec. 63—

[Irrigation Law of 1907]

Duties. Sec. 64—Duties of engineer in cases of appeal. Sec. 65—Verdict of board to be final, unless appeal to district court. Sec. 66—Duties of board in cases of appeal to district court. Costs, how collected. Sec. 67—Board may adopt seal. Misdemeanor to fail to answer summons of board. Penalty. Sec. 68—Salaries of board. Expenses. Sec. 69—Clerk to be appointed by board. Salary. Sec. 70—Granting rights of way over Territorial lands. Sec. 71—Permits, etc., to be filed, where. Sec. 72—Unlawful to divert waters, to other valley. Penalties for violation of this section. Sec. 73—Repeal section.

By an amendment in Laws of 1909, page 149, the foregoing laws are not to apply to stockmen or stock owners who may build or construct water tanks or wells for watering stock. By an amendment in Laws of 1909, page 374, the time is extended to complete appropriations begun under the act of 1907.

Text, c. 58.

Irrigation Districts.—The Wright Act of California is introduced in Statutes of 1909, chapter 109, page 295; Statutes of 1909, chapter 140, page 383.

Miscellaneous.—Concerning artesian wells, see Laws of 1909, page 177, chapter 64, and page 382. Regarding co-operation with United States Geological Survey, see Laws of 1909, page 195. Acceptance is made of the Carey Act in Laws of 1909, page 260. Towns, cities and villages may furnish water to irrigators (Laws 1909, p. 206). Flood waters may be impounded under special provisions (Laws 1909, p. 371).

New Mexico Statutes Construed.—In the earlier parts of this book (Parts I to VII, inclusive), New Mexico Statutes are construed or cited upon the following pages:

Constitution.

Art. 2, secs. 18, 20.....648, 649

General Laws.

Comp. Laws 1874, sec. 17..... 252
Gen. Laws 1880, art. ——, sec. 2..... 324

Session Laws.

Laws 1905, c. 15, sec. 1, p. 43.....1309, 1319
Laws 1905, p. 270.....120, 301, 521, 523, 549, 620, 1116
Laws 1907, p. 71.....38, 40, 44, 50, 154, 194, 233, 296, 297, 490, 503, 504, 508, ...551, 578, 584, 620, 657, 696, 733, 1276, 1319

Session Laws—Continued.

Laws 1909, p. 149 438
Laws 1909, p. 177, c. 64 1072
Laws 1909, p. 195 1309
Laws 1909, p. 260 1266
Laws 1909, p. 295, c. 109 1263
Laws 1909, p. 371 381
Laws 1909, p. 374 443
Laws 1909, p. 382 1072
Laws 1909, p. 383, c. 140 1263

(3d ed.)
§ 1441. NORTH DAKOTA.

Declaration of State ownership.
Concerning riparian rights.
Administration.
Determination of existing priorities.
Method of appropriating.
Duty and measurement of water.
Fees of State Engineer.
Miscellaneous.
North Dakota statutes construed.

In the session of the legislature of 1905, a statute was adopted after discussion in the North Dakota Irrigation Congress. This statute is the act of 1905, chapter 34; Revised Codes of 1905, section 7604 et seq. See chapter 37 of the Code of Civil Procedure of the Revised Codes of 1905.

The legislation in North Dakota was formerly modeled upon the Civil Code of California (Stats. 1901, p. 268). References are to the act of 1905 unless otherwise stated.

Text, §§ 6, 170.

Declaration of State Ownership.—All waters from all sources belong to the public (sec. 1). "All flowing streams and natural watercourses shall forever remain the property of the State for mining, irrigating and manufacturing purposes." (Const., art. 17, sec. 210. See Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570.)

Text, § 117.

Concerning Riparian Rights.—All waters except navigable streams are subject to appropriation (sec. 1). Beneficial use shall be the basis, the measure and the limit of right; priority gives the better right (sec. 2).

In the Revised Codes (Civ. Code, sec. 4798) appears the statute borrowed from Colorado that all landowners on the bank of a stream have the right to the use of the water for irrigation.

The courts uphold the common-law riparian rights of private land.

Text, c. 49.

Administration.—The use of water is a public use (sec. 3). The office of State Engineer is created with powers of general

[Administration]

supervision over the State (sec. 5). He shall keep records (sec. 11), and make rules subject to modification by vote of the board of water commissioners (sec. 12). He shall make surveys of streams (sec. 14), and co-operate with the United States Reclamation Service (sec. 14); and may inspect the works of appropriators at any time (sec. 27).

The whole State is divided into four water divisions (sec. 37), with one commissioner for each division (sec. 38), having general control over the waters within his division (sec. 39). The divisions may be subdivided by the State Engineer into water districts (sec. 42), with one water-master for each district, and he shall have immediate charge of the waters (sec. 43). A board of water commissioners is established, consisting of the water commissioners and the State Engineer, and this board has general supervision over the whole State (sec. 4).

Police regulations consist in such provisions as that use of unsafe works is a misdemeanor (sec. 28); likewise the failure to maintain a measuring device (sec. 52); interference with officials (sec. 53); or any acts in general which contravene the statute (sec. 54). These are all misdemeanors, and the penalty therefor is provided in section 57.

Text, c. 51.

Determination of Existing Priorities.—On completion of the survey of any stream system the State Engineer delivers the data to the attorney general. Suit is brought by the attorney general within sixty days, unless already begun by private parties, in which case the attorney general may intervene on behalf of the State (sec. 13). All claimants are made parties and bear the cost between them (sec. 16). A referee may be appointed to take the evidence (sec. 33). A decree is rendered, and two certified copies thereof are given to the appropriator, who files one with the State Engineer and the other in the office of the water commissioner of the division in which the stream lies (sec. 19).

Text, c. 18.

Method of Appropriating.—Before commencing work, application must be made to the State Engineer on a form prescribed by him, with any maps he may demand. Additional information may be required by him concerning works that are to exceed five

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hundred cubic feet per second, or concerning dams over thirty feet in height (sec. 19). An examination of the application, corrections thereof and refiling, follow (sec. 20). Notice is then published once a week for four weeks and proof of publication made (sec. 22). If approved the approval is indorsed upon the application, which constitutes a permit (sec. 22). From the refusal of the State Engineer to approve the application, appeal lies to court if taken within sixty days (sec. 23).

Prosecution of the work must continue with diligence (secs. 2 and 24). One-fifth of the work must be completed in one-half the time allowed (sec. 24); and the completion must be within five years (secs. 20, 22), unless the time is extended (not over three years) by the State Engineer (secs. 24, 30). A notice of completion is filed with the State Engineer, who makes an inspection (sec. 25), and issues a certificate of completion (sec. 26). Actual application of the water to beneficial use must follow within four years (sec. 22), unless the time is extended by the State Engineer for a time not over two years (sec. 30). Notice is given to the State Engineer of the actual application, and he makes an inspection and issues the final certificate, which is called a license (sec. 29).

A change in the point of diversion may be made only with the approval of the State Engineer (sec. 23).

The right relates back to date of filing application in the office of the State Engineer (sec. 2).

By an amendment in laws of 1909 (Senate Bill No. 188) a simplified method is provided for appropriating flood waters from coulees which, for the greater portion of the year, flow less than one-third of a cubic foot per second. Application must be filed with State Engineer (Laws 1909, c. 152, p. 179).

Text, §§ 486, 487.

Duty and Measurement of Water.—The second-foot and the acre-foot are the standards of measurement for time and volume respectively (sec. 47). The miner's inch is declared equal to one-fiftieth of a second-foot (sec. 47). The maximum allowed for irrigation shall not exceed one second-foot for each eighty acres irrigated (sec. 49). In the case of water from coulees flowing less than one-third of a second-foot, the maximum is two acre-feet per acre per season. (Stats. 1909, p. 179, Senate Bill 188.)

Fees of State Engineer are provided in section 10.

Miscellaneous.—Canal companies are trustees for consumers (sec. 19). Nonuser for three years causes loss of right (sec. 48). Provisions concerning change of purposes of use are given in section 51; concerning seepage water, section 49; concerning State lands, section 60.

A transfer of the water-right for use on different lands may be made only on application to the State Engineer and publication of notice (sec. 50).

Assignments of water-rights or of permits must be recorded in the office of the State Engineer (sec. 31).

Statute of 1907, page 444, chapter 271, defines a watercourse (quoted, *supra,* § 334).

Concerning water users associations under Federal projects, see Statutes of 1905, chapter 193. Concerning appropriations by the United States, see Laws 1905, chapter 34, section 36, page 54.

In the Laws of 1911, chapter 124, page 202, and chapter 125, page 203, concern drainage; and Laws 1911, chapter 327, page 580, makes it a crime to obstruct the flow of water in either a natural or artificial channel.

North Dakota Statutes Construed.—In the earlier parts of this book (Parts I to VII, inclusive) North Dakota Statutes are construed or cited upon the following pages:

Constitution.

Art. 16, sec. 203 201
Art. 17, sec. 210 .....194, 198, 199

Compiled Laws.

Comp. Laws 1887, sec. 2030.....249, 657

Revised Codes.

Rev. Codes 1905, sec. 4798 144
Rev. Codes 1905, sec. 4928 629
Rev. Codes 1905, sec. 7604 (Laws 1905, c. 34, *infra*).....50, 120, 194, 503, 504, ... 523, 555

Session Laws.

Stats. 1905, c. 34, sec. 1.....120, 194, 453, 551
Stats. 1905, c. 34, sec. 2.....453, 503, 504
Stats. 1905, c. 34, sec. 3.....657, 1166

Session Laws—Continued.

Stats. 1905, c. 34, sec. 10 453
Stats. 1905, c. 34, sec. 19 ..... 440, 1161, 1166
Stats. 1905, c. 34, sec. 21 551
Stats. 1905, c. 34, sec. 23 ..... 296, 445, 551
Stats. 1905, c. 34, sec. 28 733
Stats. 1905, c. 34, sec. 30 551
Stats. 1905, c. 34, sec. 31 584
Stats. 1905, c. 34, sec. 36, p. 54 ..... 1276, 1309, 1319
Stats. 1905, c. 34, sec. 43 733
Stats. 1905, c. 34, sec. 44 ..... 578, 579
Stats. 1905, c. 34, sec. 47 521
Stats. 1905, c. 34, sec. 48 620
Stats. 1905, c. 34, sec. 49 ..... 50, 523
Stats. 1905, c. 34, sec. 50 ..... 296, 551
Stats. 1905, c. 34, sec. 51 555
Stats. 1905, c. 34, secs. 52–54 733
Stats. 1905, c. 34, sec. 57 733
Stats. 1905, c. 34, sec. 60 233
Stats. 1905, c. 34, sec. 61, p. 59 ..... 1309, 1319
Stats. 1905, c. 193, sec. 14 1309
Stats. 1907, p. 444 354
Stats. 1909, c. 152, p. 179 ..... 381, 523, 657
Stats. 1911, c. 263, p. 468 144

(3d ed.)
§ 1442. OKLAHOMA.

Declaration of public ownership.
Concerning riparian rights.
Eminent domain.
Administration.
Adjustment of existing priorities.
Method of appropriating.
Measurement of water.
Miscellaneous.
Oklahoma statutes construed.

References are to the Laws of 1905, page 274, chapter 21. There have been no changes of importance since. There is nothing upon waters in the Constitution, and some question has been made whether the Constitution continues the act of 1905 in force. (The Schedule, art. 14, sec. 2, continues existing laws, in general terms.) The law previous to the passage of the act of 1905 is contained in Revised Statutes of 1903, chapter 44.

Text, §§ 6, 170.

Declaration of Public Ownership.—All waters are declared to belong to the public.

Text, § 117.

Concerning Riparian Rights.—The act contains, in section 1, provisions similar to those of South Dakota given below. The court assumes that the common law of watercourses is in force. (See text, § 117, *supra.*)

Eminent Domain.—"No private property shall be taken or damaged for private use with or without compensation unless by the consent of the owner, except for private ways of necessity or for drains and ditches across lands of others for agricultural, mining, or sanitary purposes, in such manner as may be prescribed by law." (Const., art. 2, sec. 23.)

Text, c. 49.

Administration.—Use of water is declared a public use (sec. 2). The office of the Territorial Engineer is mentioned throughout the act; but no such office was created, and the duties of the

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Territorial Engineer are to be performed by the secretary of the board of agriculture for the present (sec. 54).

The powers and duties of the Territorial Engineer are similar to those contained in the South Dakota act of the same year, outlined below. The Territorial Engineer has the power to subdivide the Territory into water districts, appointing a water-master for each district (sec. 32 et seq.). For obstructing the officials or failure to maintain the proper devices the usual punishments are specified (in sec. 43).

Text, c. 51.

Adjustment of Existing Priorities.—The Territorial Engineer, having made a complete survey of a stream (secs. 4 and 6), furnishes the results to the attorney general, who, within sixty days, brings suit against the water users, unless suit is already brought by private parties (sec. 5). A referee may be appointed by the court (sec. 23). A decree stating specified details is filed with the Territorial Engineer and also recorded in the county where the stream lies (sec. 8).

Text, c. 18.

Method of Appropriating.—Before commencing work, an application for a permit must be made to the Territorial Engineer in the usual way (sec. 10). Notice thereof is published (sec. 11), and the approval indorsed thereon (sec. 12). Beginning work without permit from the Territorial Engineer is a misdemeanor (sec. 40). The work must be prosecuted with diligence (sec. 14), and one-fifth thereof must be completed in one-half the time specified for the completion thereof, which is five years (sec. 10), unless the Territorial Engineer specifies a shorter time (sec. 12), or a longer time, not exceeding three years additional (sec. 20). Notice of completion being filed with the Territorial Engineer, he makes an inspection (secs. 15 and 17), and issues a certificate of completion (sec. 16). Actual application and use of the water must be made within four years after completion, unless the Territorial Engineer specifies a shorter time, or a longer time not exceeding two years additional (sec. 20). On or before the date set for actual application of the water to beneficial use, the Territorial Engineer makes an inspection, and if satisfactory, issues a license (sec. 19), which is the final certificate issued. The doc-

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trine of relation is preserved (in sections 1 and 10), the priority of right relating back to the original application for permit.

Text, §§ 486, 487.

Measurement of Water.—The second-foot and the acre-foot are the units of time and flow respectively (sec. 27). One second-foot for seventy acres is the maximum allowed for irrigation (sec. 29).

Miscellaneous.—Fees of the Territorial Engineer are specified in section 53. All liens provided for in this act shall be superior in right to all mortgages or other encumbrances hereafter (sec. 44). The water-right is appurtenant to the land (secs. 1 and 21), and transfer thereof is restricted and can be made only upon application to the Territorial Engineer and publication of notice (secs. 21 and 30). Provisions concerning water or canal companies are contained in sections 9, 25. Nonuser for two years causes forfeiture (sec. 28). Appropriations by the United States are covered by Laws of 1905, chapter 21, section 26, page 287.

Oklahoma Statutes Construed.—In the earlier parts of this book (Parts I to VII, inclusive) Oklahoma Statutes are construed or cited upon the following pages:

Constitution.

Art. 2, sec. 7 648
Art. 2, sec. 23 ..... 249, 657
Art. 2, sec. 24 649

Session Laws.

Stats. 1905, p. 274, c. 21, sec. 1 38
Stats. 1905, p. 274, c. 21, sec. 2 ..... 657, 1166
Stats. 1905, p. 274, c. 21, sec. 10 549
Stats. 1905, p. 274, c. 21, sec. 21 ..... 296, 521, 551, 587
Stats. 1905, p. 274, c. 21, sec. 26 ..... 1276, 1309, 1319
Stats. 1905, p. 274, c. 21, sec. 27 521
Stats. 1905, p. 274, c. 21, sec. 28 620
Stats. 1905, p. 274, c. 21, sec. 29 523
Stats. 1905, p. 274, c. 21, sec. 30 ..... 296, 521, 587
Stats. 1905, p. 274, c. 21, sec. 45 50
Stats. 1905, p. 274, c. 21, sec. 47 1319
Stats. 1905, p. 274, c. 21, sec. 48 ..... 1309, 1319

(3d ed.)
§ 1443. OREGON.

Concerning riparian rights.
Irrigation districts.
Public service—Water companies and consumers.
Miscellaneous.
Water law of Oregon of 1909.
Laws of 1911.
Practical working of the Oregon water law.
Oregon statutes construed.

See Lord's Oregon Laws of 1910, section 6525 et seq. Originally, the Statutes of Oregon (Hill's Annotated Laws of 1892, page 1930, sections 1–9; Bellinger and Cotton's Annotated Codes, title 11) had been modeled upon the Civil Code of California. In the Laws of 1899, page 172, a more enlarged treatment was given the subject, but still resembling the California code (amended in Statutes of 1901, page 136; 1903, special session, page 25). In 1905, page 401, a new statute was passed modeled upon the recent statutes of the arid States, but not fully the same. In Laws of 1909, chapters 216 and 221, a new law was passed similar to the Wyoming code, covering the subject generally. There were some new enactments in 1911. There is nothing in the State Constitution upon the subject.

The Law of 1905 had provided for posting notice as under the California Civil Code, and filing a copy with the State Engineer; likewise for filing with the State Engineer copies of court decrees.

The Laws of 1909 and 1911 being printed below in full, only a few matters are specially noted here.

Text, §§ 117, 129.

Concerning Riparian Rights.—Until the decision in Hough v. Porter (1908), 51 Or. 318, 98 Pac. 1083, the Oregon laws upheld the common law of riparian rights for private land upon the same terms as in California, but in that case it is held, in reliance upon the Desert Land Act of Congress of 1877, that no land patented since 1877 can have riparian rights except such a flow as may be necessary for domestic use upon the land.

A very recent case, decided too late to be cited in the text, says it is too late now to deny the existence of riparian rights in Oregon. Eastern Oregon etc. Co. v. Willow River etc. Co., 187 Fed. 466.

Text, c. 58.

Irrigation Districts.—Irrigation districts based upon the Wright Act of California are provided in Bellinger and Cotton's Annotated Codes, section 4700 et seq., and Lord's Oregon Laws, section 6525 et seq.; amended in Statutes of 1911, chapter 223, page 378. (See, also, Stats. 1911, c. 40, p. 63, dissolving Malheur Irr. Dist.; Stats. 1911, c. 172, p. 256, for the incorporation of co-operative irrigation or drainage companies; Stats. 1911, c. 241, p. 424, for drainage districts.)

Text, Part VII.

Public Service.—The use of water for sale, rental and distribution is declared a public use and subject to regulation (Lord's Laws, sec. 6525; Bellinger & Cotton's Ann. Codes, title 11, sec. 4993), following the California Constitution. A Public Utilities Commission, having jurisdiction over water companies, was created by Statutes of 1911, chapter 279, page 483.

Miscellaneous.—In the Statutes of 1907, page 287, chapter 145, Multnomah Falls are reserved from appropriation, the first legislation the writer recalls withdrawing specific water from appropriation. To pollute North Umpqua River (Stats. 1911, c. 8, p. 27), or Deschutes River (Stats. 1911, c. 45, p. 66), is declared a crime. Concerning co-operation with United States Reclamation Service, see Statutes of 1905, page 401, and Statutes of 1911, chapter 71, page 110.

The legislature in 1868 passed an act (Laws 1868, p. 22, sec. 9) authorizing the creation of drainage districts, which contains the following provision: "This chapter shall not be construed so as to interfere with the rights of companies or individuals for mining, manufacturing, or watering towns or cities." (B. & C. Comp., sec. 4368.) In 1885 an act was passed granting to individuals and to corporations rights of way over swamp and other lands belonging to the State, to construct ditches for manufacturing purposes. (*Ibid.*, sec. 3338.) In 1899 another law was enacted which provided that all existing appropriations of water for beneficial purposes should be respected and upheld, "nor shall any existing mill be deprived of its water-power, however lawfully acquired, without the consent of its owner." (*Ibid.*, sec. 5032.)

Water Law of Oregon.—Chapter 216, Laws of 1909; Lord's Oregon Laws, section 6575 et seq.

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"An act providing a system for the regulation, control, distribution, use, and right to the use of water, and for the determination of existing rights thereto within the State of Oregon, providing penalties for its violation and appropriating money for the maintenance thereof, and declaring an emergency.

"*Be it enacted by the Legislative Assembly of the State of Oregon:*

"*Be it enacted by the People of the State of Oregon:*

"Section 1. Subject to existing rights, all waters within the State may be appropriated for beneficial use, as herein provided, and not otherwise; but nothing herein contained shall be so construed as to take away or impair the vested right of any person, firm, corporation, or association, to any water.

"Section 2. *Water Divisions.*—The State of Oregon is hereby divided into two water divisions, as follows:

"Water Division No. 1 shall consist of all the lands embraced within the following counties, to wit: Benton, Clackamas, Columbia, Clatsop, Coos, Curry, Douglas, Josephine, Jackson, Klamath, Lake, Lane, Linn, Lincoln, Marion, Polk, Multnomah, Tillamook, Yamhill and Washington.

"Water Division No. 2 shall consist of all the lands embraced within the remaining counties of the State.

"Section 3. *Division Superintendents, Appointments and Term of.*—There shall be one superintendent for each water division, who shall, immediately after this act becomes effective, be appointed by the governor to serve until January 1, 1911, or until his successor is appointed or elected and shall have qualified, and who shall be a resident of the water division for which he is appointed. At the general election in 1910, and every four years thereafter, there shall be elected by the voters of the counties of the first and second water divisions of the State a division superintendent, each of whom shall hold office for the term of four years, or until his successor is elected and qualified. Each of said water superintendents shall have knowledge and experience relative to the irrigation law and its administration, and measurement of flowing water, evaporation, seepage, and common alkalies, drainage and the hydrographic features of the water division in which the candidate may reside.

"Section 4. *Duties.*—Said division superintendent shall have general control over the water-masters of the several districts within his division. He shall execute the laws relative to the distribution of water, and perform such other functions as may be assigned to him. He shall have authority to make such reasonable regulations to secure the equal and fair distribution of water in accordance with the determined rights as may be needed in his division. Such regulations shall not be inconsistent with the laws of the State.

"Section 5. *Appeal from.*—Any person, association, or corporation who may deem himself, or itself, aggrieved by any such order or regulation of such division superintendent shall have the right to appeal from the same to the Board of Control by filing with it a copy of the order or regulation complained of and a statement of the manner in which the same injuriously affects the petitioner's interest. The board shall, after due notice, hear whatever testimony may be adduced by the petitioner, either orally or by affidavit, and shall have the power to suspend, amend or confirm the order complained of.

"Section 6. *Water Division Superintendent and Compensation of.*—Each division superintendent shall receive a salary of two thousand four hundred dollars per annum, in full compensation for all his services, and shall in addition thereto be paid his actual traveling expenses when called away from home in the performance of his duties. Such salary and expenses shall be paid at the same time and in the same manner as those of other State officers. Such division superintendents shall not engage in any other business.

"Section 7. *Oath and Bond.*—Before entering upon the duties of his office, each division superintendent shall take and subscribe an oath faith-

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fully to perform the duties of his office, and file with the Secretary of State said oath and his official bond in the penal sum of five thousand dollars, with surety, or sureties, to be approved by the governor, and conditioned for the faithful discharge of the duties of his office.

"Section 8. *State Engineer.*—As soon as possible after this act shall become effective a State Engineer, technically qualified and experienced as a hydraulic engineer, shall be appointed by the governor. He shall hold his office until January 1, 1911, unless sooner removed by the governor for cause, and until his successor shall have been elected and shall have qualified. At the general election held in November, 1910, and every four years thereafter, there shall be elected a State Engineer by the voters of the State, whose term of office shall be four years, and until his successor is elected and qualified. He shall receive a salary of $2400.00 per annum and actual necessary traveling expenses while away from his office in the discharge of official duties, payable as other State officers are paid. He shall perform such duties as are prescribed by law, and may employ assistants and purchase materials and supplies necessary for the proper conduct and maintenance of his department in pursuance of appropriations as made from time to time for such purposes.

"Section 9. *Board of Control.*—The State Engineer and the superintendents of the two water divisions shall constitute a Board of Control, which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the State, and of their appropriation, distribution, and diversion, and of the various officers connected therewith. The decisions of said board shall be subject to appeal to the circuit and supreme courts, which appeal shall be governed by the practice in suits in equity, unless otherwise provided herein. Said board shall have an office in the capitol at Salem, and shall hold two regular meetings each year for the transaction of such business as may come before it, the first of said meetings to begin on the second Wednesday in April and the second on the third Wednesday in November. The State Engineer shall be *ex-officio* president of said board, and shall have a right to vote on all questions coming before it. A majority of said board shall constitute a quorum to transact business. The board shall have power to adjourn meetings from time to time, and to meet in special session at the call of the president, or of any two members. Notice of any special meeting must be given by registered mail to each member three days before the date thereof, but such meeting may be held at any time when all members of the board are present.

"Section 10. *Secretary and Other Assistants; Salary.*—The Board of Control shall have authority, with power of removal, to appoint a secretary, who shall receive a salary of twelve hundred dollars per annum. He may be required by the board to furnish such bond as it may deem necessary, for the faithful performance of his duties. The duties of the secretary shall consist in keeping a full, true, and complete record of the transactions of the Board of Control, and he shall certify, under seal, all water-right certificates made according to law. He shall perform such other duties as may be imposed by law or required of him by the board. Said board shall also have the power to employ such other assistants and purchase materials and supplies as may be necessary for the proper conduct of its business.

"Section 11. *Determination.*—Upon a petition to the Board of Control, signed by one or more water users upon any stream, requesting the determination of the relative rights of the various claimants to the waters of that stream, it shall be the duty of the Board of Control, if, upon investigation, they find the facts and conditions are such as to justify, to make a determination of the said rights, fixing a time for beginning the taking of testimony and the making of such examination as will enable them to determine the rights of the various claimants. In case suit is brought in the circuit court for the determination

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of rights to the use of water, the case may, in the discretion of the court, be transferred to the Board of Control for determination as in this act provided.

"Section 12. *Notice of Proceedings.*—The board shall prepare a notice, setting forth the date when the engineer will begin an investigation of the flow of the stream and of the ditches diverting water therefrom, and a place and a time certain when the superintendent of the water division in which that stream is situated shall begin the taking of testimony as to the rights of the parties claiming water therefrom. Said notice shall be published in two issues of one or more newspapers having general circulation in the counties in which such stream is situated, the last publication of said notice to be at least thirty days prior to the beginning of taking testimony by said division superintendent, or for the measurement of the stream by the State Engineer, or his assistant. The superintendent taking such testimony shall have the power to adjourn the taking of testimony from time to time and from place to place, to suit the convenience of those interested.

"Section 13. *Notice to Claimants.* It shall be the duty of said division superintendent to send by registered mail to each person, firm or corporation, hereinafter to be designated as claimant, claiming the right to the use of any of the waters of said stream, and to each person, firm or corporation owning or being in possession of lands bordering on and having access to said stream or its tributaries, in so far as such claimants and owners and persons in possession can reasonably be ascertained, a similar notice setting forth the date when the State Engineer or his assistant will begin the examination of the stream and the ditches diverting the waters therefrom, and also the date when the superintendent will take testimony as to the rights to the water of said stream. Said notice must be mailed at least thirty (30) days prior to the date set therein for making the examination of the stream or the taking of testimony.

"Section 14. *Statement of Claimant.*—The division superintendent shall, in addition, inclose with said notice a blank form on which said claimant or owner shall present in writing all the particulars necessary for the determination of his right to the waters of the stream to which he lays claim, the said statement to include the following:

"The name and postoffice address of the claimant.

"The nature of the right or use on which the claim is based.

"The time of initiation of such right or the commencement of such use, and if distributing works are required.

"The date of beginning of construction.

"The date when completed.

"The date of beginning and completion of enlargements.

"The dimensions of the ditch as originally constructed and as enlarged.

"The date when water was first used for irrigation or other beneficial purposes, and if used for irrigation, the amount of land reclaimed the first year, the amount in subsequent years, with the dates of reclamation, and the amount and general location of the land such ditch is intended to irrigate.

"The character of the soil and the kind of crops cultivated, and such other facts as will show a compliance with the law in acquiring the right.

"Section 15. *Statement to be Under Oath.*—Each claimant or owner shall be required to certify to his statements under oath, and the superintendent of the water division in which the testimony is taken is hereby authorized to administer such oaths, which shall be done without charge, as also shall be the furnishing of blank forms for said statement.

"Section 16. *Testimony Taken by Division Superintendent.*—Upon the date named in the notice provided for herein for the taking of testimony, the division superintendent shall begin the taking of such testimony and shall continue until completed. In case the division superintendent of any water division is directly or indirectly interested in the water of any stream of his division, or is prevented by illness

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or otherwise from the taking of such proofs, the taking of testimony so far as relates to said stream shall be under the direction of any other member of the Board of Control.

"Section 17. *Fees.*—At the time of the submission of proof of appropriation, or at the time of the taking of testimony for the determination of rights to water, the division superintendent shall collect from each of the claimants or owners a fee of one dollar for the purpose of recording the water-right certificate, when issued, in the office of the county clerk, together with the additional fee of fifteen cents for each acre of irrigated lands up to and including 100 acres, and five cents per acre for each acre in excess of 100 acres up to and including 1,000 acres, and one cent for each acre in excess of 1,000; also 25 cents for each theoretical horse-power up to and including 100 horse-power, and fifteen cents for each horse-power in excess of 100 up to and including 1,000 horse-power, and five cents for each horse-power in excess of 1,000 horse-power up to and including 2,000 horse-power, and two cents for each horse-power in excess of 2,000 horse-power, as set forth in such proof, the minimum fee, however, for any claimant or owner in such cases to be $2.50, also a fee of five dollars for any other character of claim to water. All fees collected by the division superintendent shall be accounted for at the following regular meeting of the Board of Control and paid by such board into the general fund of the State treasury, except, however, those fees due, or to be paid to the county clerk. But in cases of appropriations of water made under a permit issued under the provisions of this act, only one dollar recording fee above provided shall be so collected by the division superintendent.

"Section 18. *Notice upon Completion of Testimony.*—Upon the completion of the taking of testimony by the division superintendent, it shall be his duty at once to give notice by registered mail to the various claimants that at a time and place named in the notice not less than ten days thereafter, all of said evidence shall be open to inspection of the various claimants or owners, and said superintendent shall keep said evidence open to inspection at said places not less than ten days, and such other time as fixed in the notice. Said superintendent shall also state in said notice the county in which the determination of the Board of Control will be heard by the circuit court; *provided,* that said cause shall be heard in the county in which said stream or some part thereof is situate.

"Section 19. *Contests.*—Should any person, corporation or persons owning any irrigation works, or claiming any interest in the stream or streams involved in the determination, desire to contest any of the rights of the persons, corporations or associations who have submitted their evidence to the superintendent as aforesaid, such persons, corporations or associations, shall within five days after the expiration of the period as fixed in the notice for public inspection, notify the superintendent in writing, stating with reasonable certainty the grounds of their proposed contest, which statement shall be verified by the affidavit of the contestant, his agent or attorney, and the said division superintendent shall notify the said contestant and the person, corporation or association, whose rights are contested, to appear before him at such convenient place as the superintendent shall designate in said notice.

"Section 20. *Hearing.*—Said superintendent shall also fix the time and place for the hearing of said contest, which date shall not be less than thirty nor more than sixty days from the date the notice is served on the party, association or corporation, which notice and returns thereof shall be made in the same manner as summons are served in civil actions in the circuit courts of this State. Superintendents of water divisions shall have power to adjourn hearings from time to time upon reasonable notice to all the parties interested, and to issue subpoenas and compel the attendance of witnesses to testify upon such hearings, which shall be served in the same manner as subpoenas issued out of the circuit courts of the State, and

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shall have the power to compel such witnesses so subpoenaed to testify and give evidence in said matter, and said witnesses shall receive fees as in civil cases, the costs to be taxed in the same manner as are costs in suits in equity. The evidence in such proceedings shall be confined to the subjects enumerated in the notice of contest.

"Section 21. *Contests; Deposit Required.*—The superintendent shall require a deposit of five dollars from each party for each day he shall be so engaged in taking evidence of said contest. Upon the final determination of the matters by the Board of Control, an order shall be entered directing that the money so deposited shall be refunded to the persons, associations or corporations in whose favor such contest shall be determined, and that all moneys deposited by other parties therein shall be turned over by the superintendent to the Board of Control, who shall pay the same into the general fund of the State treasury upon adjournment of each regular meeting of the board.

"Section 22. *Evidence Transmitted.* Upon the expiration of the period for which the evidence is kept open for inspection, the evidence in the original hearing before the superintendent, and the evidence taken in all contests, shall be transmitted by the superintendent to the office of the Board of Control in person, or by registered mail. Such evidence shall thereupon be filed with the board.

"Section 23. *Measurements of Streams and Ditches.*—It shall be the duty of the State Engineer, or some qualified assistant, to proceed at the time specified in the notice to the parties on said stream to make an examination of said stream and the works diverting water therefrom, said examination to include the measurement of the discharge of said stream and of the carrying capacity of the various ditches and canals, and examination of the irrigated lands; and an approximate measurement of the lands irrigated or susceptible of irrigation from the various ditches and canals; and to take such other steps and gather such other data and information as may be essential to the proper understanding of the relative rights of the parties interested; which said observation and measurement shall be reduced to writing and made a matter of record in his office, and it shall be the duty of the State Engineer to make or cause to be made a map or plat on a scale of not less than one inch to the mile, showing with substantial accuracy the course of said stream, the location of each ditch or canal diverting water therefrom, and the legal subdivisions of lands which have been irrigated or which are susceptible of irrigation from the ditches and canals already constructed.

"Section 24. *Order Determining Water-rights.*—As soon as practicable after the compilation of said data, and the filing of said evidence, it shall be the duty of the Board of Control to make, and cause to be entered of record in its office, an order determining and establishing the several rights to the waters of said stream. As soon as practicable thereafter a certified copy of said determination shall be filed in the office of the county clerk of each county in which said stream, or any part thereof or any tributary, is situated, and the original evidence filed with the Board of Control shall be certified by the clerk of the board, and, together with a certified copy of said determination, shall be filed with the clerk of the circuit court by which such determination is to be heard. The determination of the board shall be in full force and effect from the date of its entry in the records of the board, unless and until its operation shall be stayed by a stay bond as provided for by this act. Upon the filing of the evidence with the circuit court of the county in which the determination is to be had, the board shall procure an order from said circuit court, or any judge thereof, fixing the time at which the determination shall be heard in said court. Copies of this order, certified by the clerk of said court, shall be filed by the board as soon as practicable in the office of the county clerk of each county in which said determination is filed.

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"Section 25. *Water-right Certificate.*—Upon the final determination of the rights to the waters of any stream, it shall be the duty of the secretary of the Board of Control to issue to each person, association or corporation represented in such determination a certificate to be signed by the president of the Board of Control, and attested under seal by the secretary of said board, setting forth the name and postoffice address of the owner of the right; the priority of the date, extent and purpose of such right; and if such water be for irrigation purposes, a description of the legal subdivisions of land to which said water is appurtenant. Such certificate shall be transmitted by the president, or other member of the Board of Control, in person or by registered mail, to the county clerk of the county in which such right is located, and it shall be the duty of the county clerk upon receipt of the recording fee of one dollar collected as hereinbefore provided, to record the same in a book especially prepared and kept for that purpose, and thereupon immediately transmit the certificates to the respective owners.

"Section 26. *Court Procedure.*—From and after the filing of the evidence and order of determination in the circuit court, the proceedings shall be as nearly as may be like those in a suit in equity, except that any proceedings, including the entry of a decree, may be had in vacation with the same force and effect as in term time. Within thirty days from the filing of such evidence and order in the circuit court, or within such further time as the court may for good cause allow, any party may file exceptions to the determination. If no exceptions shall be filed, the court shall on the day set for hearing enter a decree affirming the determination of the board.

"All parties may be heard by counsel upon the consideration of the exceptions. The court may, if necessary, remand the case for such further evidence to be taken by the superintendent of the water division as it may direct, and may require a further determination by the board. After the hearing, the court shall enter a decree affirming or modifying the order of the Board of Control. Upon the hearing, the court may assess and adjudge against any party such costs as it may deem just. Appeals may be taken to the supreme court from such decrees in the same manner and with the same effect as in other cases in equity, except that notice of appeal must be served and filed within sixty days from the entry of the decree.

"Section 27. *Clerk Shall Transmit Transcript to Clerk of Board.*—The clerk of the circuit court, immediately upon the entry of any decree by the circuit court or by the judge thereof, shall transmit a certified copy of said decree to the secretary of the Board of Control. The secretary shall immediately enter the same upon the records of such office and the State Engineer shall forthwith issue to the superintendent or superintendents of water divisions instructions in compliance with the said decree, and in execution thereof.

"Section 28. *Distribution.*—During the time the hearing of the order of the Board of Control is pending in the circuit court, and until a certified copy of the judgment, order or decree of the circuit court is transmitted to the Board of Control, the division of water from the stream involved in such appeal shall be made in accordance with the order of the board.

"Section 29. *Stay Bond.*—At any time after the determination of the board has been entered of record, the operation thereof may be stayed in whole or in part by any party by filing a bond in the circuit court wherein such determination is pending in such amount as the judge thereof may prescribe, conditioned that such party will pay all damages that may accrue by reason of such determination not being enforced. Immediately upon the filing and approval of such bond, the clerk of the circuit court shall transmit to the board of control a certified copy of such bond, which shall be recorded in the records by such board, and the State Engineer shall immediately give notice thereof to the superintendent of the proper water division.

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"Section 30. *Rehearing.* — Within six months from the date of the decree of the circuit court determining the rights upon any stream, or if appealed within six months from the decision of the supreme court, the board of control, or any party interested, may apply to the circuit court for a rehearing upon grounds to be stated in the application. Thereupon, if in the discretion of the court it shall appear that there are good grounds for the rehearing, the circuit court, or judge thereof, shall make an order fixing a time and place when such application shall be heard. The clerk of the circuit court shall, at the expense of the petitioner, forthwith mail written notice of said application to the board of control and to every party interested, and state in such notice the time and place when such application will be heard.

"Section 31. *Authorized to Administer Oaths.*—The members of the Board of Control may administer oaths in the performance of their official duties.

"Section 32. *Fees.*—The secretary of the Board of Control shall collect the following fees, which shall be paid in advance, and accounted for to the board, which fees shall be paid into the general fund of the State Treasury by such board at the adjournment of each regular meeting; for making transcripts of the records of the board of control or of papers or documents filed with said board, one dollar for the first folio and ten cents for each additional folio. For attaching certificate and seal of the board to each transcript, one dollar.

"Section 33. *Conclusive, When.*— The determinations of the Board of Control as confirmed or modified as provided by this act in proceedings shall be conclusive as to all prior rights, and the rights of all existing claimants upon the stream or other body of water lawfully embraced in the determination.

"Section 34. *Duty of Water-right Claimants.* — Whenever proceedings shall be instituted for the determination of the rights to the use of any water, it shall be the duty of all claimants interested therein to appear and submit proof of their respective claims, at the time and in the manner required by law; and any such claimant who shall fail to appear in such proceedings and submit proof of his claims shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in such proceedings, and shall be held to have forfeited all rights to the use of said water theretofore claimed by him. Any person, association or corporation interested in the water of any stream upon whom or which no service of notice shall have been had of the pendency of proceedings for the determination of the rights to the use of the water of said stream, and who or which shall have no actual knowledge or notice of the pendency of said proceedings, may at any time prior to the expiration of one year after the entry of the determination of the board, file a petition to intervene in said proceedings. Such petition shall contain, among other things, all matters required by this act, of claimants who have been duly served with notice of said proceedings and also a statement that the intervenor had no actual knowledge or notice of the pendency of said proceeding. Upon the filing of said petition in intervention, the petitioner shall be allowed to intervene upon such terms as may be equitable, and thereafter shall have all rights vouchsafed by this act to claimants who have been duly served.

"Section 35. *Proof Open to Inspection; Who may Contest.*—Whenever the rights to the waters of any stream have been determined as herein provided, and it shall appear by the records of such determination that it had not been at one and the same proceeding, then in such case the Board of Control may open to public inspection, all proofs or evidence of rights to the water, and the findings of the board in relation thereto in the manner provided in section 18; and any persons, corporations, or associations who may desire to contest the claims or rights of other persons, corporations, or associations, as set forth in the proofs or established by the board, shall proceed in the manner provided for in sections 19, 20 and 22; *provided,* that contests

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may not be entered into and shall not be maintained except between claimants who were not parties to the same adjudication proceedings in the original hearings.

"WATER-MASTERS.

"Section 36. *Districts.*—The Board of Control shall divide each water division into water districts, and said water districts to be so constituted as to secure the best protection to the claimants for water and the most economical supervision on the part of the State; said water district shall not be created until a necessity therefor shall arise, but shall be created from time to time as the claims thereof from the streams of the State shall be determined.

"Section 37. *Water-master; How Appointed.*—There shall be appointed by the Board of Control, one water-master for each water district, who shall be a resident of the district he is appointed for and who shall have been a resident of said district for one year immediately prior to the date of his appointment, shall be selected from persons recommended by the superintendent of the water division in which such water district is situated. Each water-master shall hold his office until his successor is elected and shall have qualified, and the Board of Control shall, by like selection and appointment, fill all vacancies which shall occur in the office of water-master.

"Section 38. *Duty of Water-master.*—It shall be the duty of the said water-masters to divide the water of the natural streams or other sources of supply of his district among the several ditches and reservoirs, taking water therefrom, according to the rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut and fastened, the headgates of ditches, and shall regulate or cause to be regulated, the controlling works of reservoirs, in time of scarcity of water, as may be necessary by reason of the rights existing from said streams of his district. The water-master shall have authority to regulate the distribution of water among the various users under any partnership ditch or reservoir, where rights have been determined, in accordance with existing decrees. Whenever, in the pursuance of his duties, the water-master regulates a headgate to a ditch or the controlling works of reservoirs, it shall be his duty to attach to such headgate or controlling works, a written notice properly dated and signed, setting forth the fact that such headgate or controlling works has been properly regulated and is wholly under his control, and such notice shall be a legal notice to all parties interested in the division and distribution of the water of such ditch or reservoir. It shall be the duty of the district attorney to appear for, or on behalf of the division superintendent or any water-master in any case which may arise in the pursuance of the official duties of any such officer within the jurisdiction of said district attorney.

"Section 39. *Water-master Shall Prevent Waste.*—Said water-master shall, as near as may be, divide, regulate and control the use of the water of all streams within his district by such closing or partially closing of the headgates as will prevent the waste of water, or its use in excess of the volume to which the owner of the right is lawfully entitled, and any person who may be injured by the action of any water-master, shall have the right to appeal to the circuit court for an injunction. Such injunction shall only be issued in case it can be shown at the hearing that the water-master has failed to carry into effect the order of the Board of Control or decrees of the court determining the existing rights to the use of water.

"Section 40. *Pay of.*—Each water-master herein provided for shall receive compensation at the rate of $5.00 per day for each day he shall be actively employed in the duties of his office. Where the service may be improved by continuous employment and upon recommendation of the division superintendent and the approval of the county court of the county, or counties, in which said district is located by an order, or orders, made at regular term, or terms, thereof when sitting for the transaction of county business, he shall receive pay at the rate of $100.00 per month, in either case to be paid by the

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county in which the work is performed. Each water-master shall keep a true and just account of time spent by him in the duties of each county, respectively, in which his duties may extend, and he shall present a true copy thereof, verified by oath, to the county court sitting for the transaction of county business of the county in which his work may be performed. And the county court shall, upon approval thereof by the superintendent of the water division, allow and pay the same. *Provided*, any water-master may be suspended by an order of the county court of any county in which his district may lie in case said court shall find and enter an order to the effect that said water-master is claiming more time than the public service requires, and during such suspension such water-master shall receive no pay.

"Section 41. *Employment of Assistants.*—Said water-master shall have power, in cases of emergency, to employ suitable assistants to aid him in the discharge of his duties. Such assistants shall take the same oath as the water-master, and shall obey his instructions, and each shall be entitled to such compensation as his services may demand and as the superintendent may recommend, not to exceed in any case, four dollars per day for each day he is employed, such payments to be made upon certificates of the division superintendent in the same manner as provided for the payment of the water-master. The term of service of such assistant water-master may be terminated at any time by the division superintendent, and shall in no event continue after the emergency has ceased to exist.

"Section 42. *Water-masters to Begin Work, When.*—When arrangements are not made for employment of a water-master at a monthly rate, as provided in section 40 of this act, the said water-master shall begin his work upon written demand being made upon him therefor by one or more water users. Such written demand for his services shall be attached to his bill for services and forwarded with it to the county commissioners of the proper county. Where the said water-master is employed by the month he shall begin work and terminate his services as the superintendent of his water division may direct. The division superintendent may, under any condition, call upon the water-master for work within his district whenever the necessity therefor may in his judgment arise.

"Section 43. *Interference With Headgate; Penalty.*—Any person who shall willfully open, close, change or interfere with any lawfully established headgate or water-box without authority, or who shall willfully use water or conduct water into or through his ditch which has been lawfully denied him by the water-master or other competent authority, shall be deemed guilty of a misdemeanor. The possession or use of water when the same shall have been lawfully denied by the water-master or other competent authority shall be *prima facie* evidence of the guilt of the person using it.

"Section 44. *Power of Arrest.*—The water-master, or his assistants, within his district shall have power to arrest any person or persons violating any of the provisions of this act and turn them over to the sheriff or other competent police officer within the county; and immediately upon delivering any such person so arrested into the custody of the sheriff, it shall be the duty of the water-master making such arrest to immediately, in writing and upon oath, make complaint before the proper justice of the peace against the person so arrested.

"PROCEDURE RELATIVE TO THE APPROPRIATION OF WATER.

"Section 45. *Application.*—Any person, association or corporation hereafter intending to acquire the right to the beneficial use of any waters shall, before commencing the construction, enlargement or extension of any ditch, canal or other distributing or controlling works, or performing any work in connection with said construction, or proposed appropriation, make an application to the State Engineer for a permit to make such appropriation. Any person who shall willfully divert or use water to the detriment of others without compliance with law, shall be

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deemed guilty of a misdemeanor. The possession or use of water, except when a right of use is acquired in accordance with law, shall be *prima facie* evidence of the guilt of the person using it.

"Section 46. *Applications, Nature of.*—Each application for permit to appropriate water shall set forth the name and postoffice address of the applicant, the source of water supply, the nature and amount of the proposed use, the location and description of the proposed ditch, canal, or other work, the time within which it is proposed to begin construction, the time required for completion of the construction, and the time for the complete application of the water to the proposed use. If for agricultural purposes, it shall give the legal subdivisions of the land and the acreage to be irrigated, as near as may be. If for power purposes, it shall give the nature of the works by means of which the power is to be developed, the head and amount of water to be utilized, and the uses to which the power is to be applied. If for the construction of a reservoir, it shall give the height of dam, the capacity of the reservoir, and the uses to be made of the impounded waters. If for municipal water supply, it shall give the present population to be served, and, as near as may be, the future requirements of the city. If for mining purposes, it shall give the nature of the mines to be served, the methods of supplying and utilizing the water. All applications shall be accompanied by such maps and drawings, in duplicate, and such other data as may hereafter be prescribed by the Board of Control, and such accompanying data shall be considered as a part of the application.

"Section 47. *Applications, Approval of.*—Upon receipt of an application, it shall be the duty of the State Engineer to make an indorsement thereon of the date of its receipt and to keep a record of the same. If upon examination the application is found to be defective, it shall be returned for correction or completion, and the date of, and reasons for the return thereof, shall be indorsed thereon and made a record in his office. No application shall lose its priority of filing on account of such defects, provided acceptable maps and drawings are filed in the office of the State Engineer within thirty days from the date of said return to the applicant. All applications which shall comply with the provisions of this act shall be recorded in a suitable book kept for that purpose, and it shall be the duty of the State Engineer to approve all applications made in proper form which contemplate the application of water to a beneficial use, but when the proposed use conflicts with determined rights, or is a menace to the safety and welfare of the public, the application shall be referred to the Board of Control for consideration. It shall be the duty of the board to enter an order directing the refusal of such application, if, after full hearing, the public interest demands. An application may be approved for a less amount of water than that applied for, if there exists substantial reasons therefor, and in any event shall not be approved for more water than can be applied to a beneficial use. Applications for municipal water supplies may be approved to the exclusion of all subsequent appropriations, if the exigencies of the case demand upon consideration and order by the Board of Control.

"Section 48. *Application, How Indorsed.*—The approval or rejection of an application shall be indorsed thereon and a record made of such indorsement in the State Engineer's office. The application so indorsed shall be returned immediately to the applicant by mail. If approved, the applicant shall be authorized, on receipt thereof, to proceed with the construction of the necessary works, and to take all steps required to apply the water to a beneficial use, and to perfect the proposed appropriation. If the application is refused, the applicant shall take no steps toward the construction of the proposed work or the diversion and use of water so long as such refusal shall continue in force.

"Section 49. *Assignment of Permit.*—Any permit or license to appropriate water may be assigned, subject to the conditions of the permit, but no such assignment shall be bind-

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ing, except upon the parties thereto, unless filed for record in the office of the State Engineer.

"Section 50. *Limitation on Time of Completing Work.*—Actual construction work shall begin within one year from the date of approval of the application and the construction of any proposed irrigation or other work shall thereafter be prosecuted with reasonable diligence, and be completed within a reasonable time, as fixed in the permit, not to exceed five years from the date of such approval. The Board of Control shall, for good cause shown, extend the time within which irrigation or other works shall be completed, or the right perfected, under any permit which may be submitted for its consideration by the State Engineer.

"Section 51. *Appeals.*—Any applicant may appeal to the Board of Control for relief, which board may modify the decisions of the State Engineer if it shall appear that he has abused the authority reposed in him by law. Such appeal shall be taken within thirty days from the date of such decision by the State Engineer, and shall be perfected when the applicant shall have filed in the office of the board a copy of the order appealed from, together with a petition setting forth the appellant's reason for appeal, and such appeal shall be heard and determined upon such competent proof as shall be adduced by the applicant, and such like proofs as shall be adduced by the State Engineer. The State Engineer shall not sit as a member of the board on such appeal.

"Section 52. *Fees.*—The following fees shall be collected by the State Engineer in advance, and be paid by him into the general fund of the State Treasury on the last day of March, June, September and December of each year:

"(*a*) For examining an applicant for permit to appropriate water, three dollars.

"(*b*) For filing and recording permit to appropriate water for irrigation purposes, fifteen cents per acre for each acre to be irrigated up to and including one hundred acres, and five cents per acre for each acre in excess of one hundred and up to and including one thousand acres; and one cent per acre for each acre in excess of one thousand acres, or in case the application is for power purposes, twenty-five cents for each theoretical horse-power to be developed up to and including one hundred, and ten cents for each horse-power in excess of one hundred and up to and including one thousand, and five cents for each horse-power in excess of one thousand; or, in case the application is for any other purpose, including applications by municipalities for power purposes, five dollars for filing and recording each permit.

"(*c*) For filing or recording any other water-right instrument, one dollar for the first hundred words and ten cents for each additional hundred words or fraction thereof.

"(*d*) For making copy of any document recorded or filed in his office, ten cents for each hundred words or fraction thereof; but where the amount exceeds $5.00, then only the actual cost in excess of that amount shall be charged.

"(*e*) For certifying to copies, documents, records, or maps, one dollar for each certificate.

"(*f*) For blue-print copy of any map or drawing, ten cents per square foot or fraction thereof. For such other work as may be required of his office, actual cost of the work.

"Section 53. *Water-right Certificate.*—Upon it being made to appear to the satisfaction of the Board of Control that any appropriation has been perfected in accordance with the provisions of this act, it shall be the duty of the Board of Control to issue to the applicant a certificate of the same character as that described in section 25. Said certificate shall be recorded and transmitted to the applicant as provided in said section. Certificates issued for rights to the use of water for power development acquired under the provisions of this act shall limit the right or franchise to a period of forty years from date of application, subject to a preference right of renewal under the laws existing at the date of expiration of such franchise or right.

"Section 54. *Date of Right.*—The right acquired by such appropriation

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shall date from the filing of the application in the office of the State Engineer.

"Section 55. *Headgate, Maintenance of.*—The owner or owners of any ditch or canal shall maintain, to the satisfaction of the division superintendent of the division in which the irrigation works are located, a substantial headgate at the point where the water is diverted, which shall be of such construction that it can be locked and kept closed by the water-master; and such owners shall construct and maintain when required by the division superintendent, suitable measuring devices at such points along such ditch as may be necessary for the purpose of assisting the water-master in determining the amount of water that is to be diverted into said ditch from the stream, or taken from it by the various users. Any and every owner or manager of a reservoir, located across or upon the bed of a natural stream, shall be required to construct and maintain, when required by the division superintendent, a measuring device of a plan to be approved by the State Engineer, below such reservoir, and a measuring device above such reservoir on each or every stream or source of supply discharging into such reservoir, for the purpose of assisting the water-master or superintendent in determining the amount of water to which appropriators are entitled and thereafter diverting it for such appropriators' use. When it may be necessary for the protection of other water users, the division superintendent may require flumes to be installed along the line of any ditch. If any such owner or owners of irrigation works shall refuse or neglect to construct and put in such headgates, flumes or measuring devices after ten days' notice, the division superintendent may close such ditch, and the same shall not be opened or any water diverted from the source of supply, under the penalties prescribed by law for the opening of headgates lawfully closed, until the requirements of the division superintendent as to such headgate, flumes or measuring device have been complied with, and if any owner or manager of a reservoir located across the bed of a natural stream shall neglect or refuse to put in such measuring device after ten days' notice by the division superintendent, such superintendent may open the sluice-gate or outlet of such reservoir and the same shall not be closed under penalties of the law for changing or interfering with headgates, until the requirements of the division superintendent as to such measuring devices are complied with.

"Section 56. *Engineer's Authority to Inspect.*—The State Engineer shall have authority to examine and inspect, during construction, any dam, authorized under the provisions of this chapter, or any ditch, canal or other work, and at the time of such inspection, or thereafter, he shall notify the parties constructing such dam, or other works, of any addition or alteration which he considers necessary for the security of the work or the safety of any person or persons residing on or owning land in the vicinity of such works, or for the safety of their property.

"Section 57. *Inspection; When Required.*—Should any person or persons residing on or owning land in the neighborhood of any irrigation works after completion, or in course of construction, apply to the State Engineer in writing desiring an inspection of such works, the State Engineer may order an inspection thereof. Before doing so he may require the applicant for such inspection to make a deposit of a sum of money sufficient to pay the expenses of an inspection, and in case the application appears to him not to have been justified, he may cause the whole or part of such expenses to be paid out of such deposit. In case the application appears to the State Engineer to have been justified, he may require the owner of the works to pay the whole or any part of the expenses of the inspection, and the same shall constitute a valid lien against the works, which may be enforced in the same manner as provided for the enforcement of mechanics' liens.

"RESERVOIRS.

"Section 58. *Procedure Under Reservoir Permit.* — All applications for reservoir permits shall be subject to the provisions of sections 45 to 51, both inclusive, except that an enumera-

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tion of any lands proposed to be irrigated under this act shall not be required in the primary permit. But the party or parties proposing to apply to a beneficial use the water stored in any such reservoir shall file an application for permit, to be known herein as the secondary permit, in compliance with the provisions of sections 45 to 51, both inclusive. Said application shall refer to such reservoir for a supply of water and shall show by documentary evidence that an agreement has been entered into with the owners of the reservoir for a permanent and sufficient interest in said reservoir to impound enough water for the purposes set forth in said application. When beneficial use has been completed and perfected under the secondary permit, the division superintendent shall take the proof of the water user under such permit and the final certificate of appropriation shall refer to both the ditch described in the secondary permit and the reservoir described in the primary permit.

"Section 59. *Duty of Water-master and Costs; How Payable.*—Whenever the owner, manager or lessee of a reservoir, constructed under the provisions of this act, shall desire to use the bed of a stream, or other watercourses, for the purpose of carrying stored or impounded water from the reservoir to the consumer thereof, he shall, in writing, notify the water-master of the district in which the stored or impounded water is to be used, giving the date when it is proposed to discharge water from such reservoir, its volume, and the names of all persons and ditches entitled to its use. It shall then be the duty of such water-master to close, or so adjust the headgates of all ditches from the stream or watercourse, not entitled to the use of such stored water, as will enable those having the right to secure the volume to which they are entitled. The water-master shall keep a true and just account of the time spent by him in the discharge of his duties as defined in this section, and it shall be the duty of the county commissioners of the county wherein the expense is incurred, to present a bill of one-half the expense so incurred to the reservoir owner, manager or lessee, and if such owner, manager or lessee shall neglect for thirty days, after the presentation of such bill of costs, to pay the same, the said costs shall be made a charge upon said reservoir and shall be collected as delinquent taxes until the complete payment of such bill of costs has been made.

"Section 60. *Attorney General and District Attorneys Advisors of State Engineer.*—The attorney general and the district or prosecuting attorney of the county in which legal questions arise, shall be the legal advisors of the State Engineer and of the Board of Control, and shall perform any and all legal duties necessary in connection with their work, without other compensation than their salaries as fixed by law.

"Section 61. *Joint Owners; Responsibility.*—In all cases where ditches are owned by two or more persons and one or more of such persons shall fail or neglect to do a proportionate share of the work necessary for the proper maintenance and operation of such ditch or ditches or to construct suitable headgates or measuring devices at the points where water is diverted from the main ditch, such owner or owners desiring the performance of such work may, after having given ten days' written notice to such other owner or owners who have failed to perform such proportionate share of the work, necessary for the operation and maintenance of said ditch or ditches, perform such share of the work, and recover therefor from such person or persons in default the reasonable expense of such work.

"Section 62. *Lien for Work Performed on Ditch.*—Upon the failure of any co-owner to pay his proportionate share of such expense, as mentioned in the preceding section, within thirty days after receiving a statement of the same as performed by his co-owner or owners, such person or persons so performing such labor may secure payment of said claim by filing an itemized and sworn statement thereof, setting forth the date of the performance and the nature of the labor so performed, with the county clerk of the county wherein said ditch is situated, and when so filed it shall constitute a

valid lien against the interest of such person or persons in default, which said lien may be established and enforced in the same manner as provided by law for the enforcement of mechanics' liens.

"Section 63. *Regulation of Partnership Ditches and Reservoirs.*—When two or more persons, joint owners in an irrigation ditch or reservoir, not incorporated, or their lessees, are unable to agree relative to the division or distribution of water received through their ditch or from their reservoir, it shall be lawful for any such owner or owners, his or their lessee or lessees, or either of them, to apply to the water-master of the district in which such ditch or reservoir shall be located, by a written notice setting forth such fact, asking the water-master to take charge of such ditch or reservoir for the purpose of making a just division or distribution of the water from the same, to the parties entitled to the use thereof. The said water-master shall take exclusive charge of such ditch or reservoir for the purpose of dividing the water therefrom in accordance with established rights, and continuing the said work until the necessity therefor shall cease to exist. In all cases where the water-master or an assistant water-master is called upon to divide the waters of a ditch or reservoir between appropriators, he shall be paid in full for his services by the interested water users in proportion to the established rights of each, and shall have a lien upon any land irrigated by the water owned by an interested water user refusing to pay, said lien to be established and enforced in the same manner as a mechanic's lien.

"Section 64. *Injunctions.*—In suits for injunction affecting the use of water from streams upon which the rights to water have been determined, no restraining order shall be granted before hearing had after at least three days' notice thereof, served upon all persons defendant. All suits for injunction involving the use of water shall be heard, either in term time or during vacation, not later than fifteen days after issues joined, unless for good cause shown further time be allowed.

"Section 65. *Water Appurtenant to Land for Irrigation Purposes.*—All water used in this State for irrigation purposes shall remain appurtenant to the land upon which it is used; *provided*, that if for any reason it should at any time become impracticable to beneficially or economically use water for the irrigation of any land to which the water is appurtenant, said right may be severed from said land, and simultaneously transferred, and become appurtenant to other land, without losing priority of right theretofore established, if such change can be made without detriment to existing rights, on the approval of an application of the owner to the Board of Control. Before the approval of such transfer an inspection shall be made by the proper division superintendent, who shall submit his report to the Board of Control, whereupon, by order, the board shall approve or disapprove such transfer and prescribe the conditions therefor. Such order shall be subject to appeal as in this act provided.

"Section 66. *Unlawful Use of Water and Waste.*—The unauthorized use of water to which another person is entitled, or the willful waste of water to the detriment of another, shall be a misdemeanor, and the possession or use of such water without legal right, shall be *prima facie* evidence of the guilt of the person using it. It shall also be a misdemeanor to use, store, or divert any water until after the issuance of permit to appropriate such waters.

"Section 67. *Obstructing Works.*—Whenever any appropriator of water has the lawful right of way for the storage, diversion, or carriage of water, it shall be unlawful to place or maintain any obstruction that shall interfere with the use of the works, or prevent convenient access thereto. Any violation of the provisions of this section shall be a misdemeanor.

"Section 68. *Penalty for Misdemeanors Under This Act.*—All violations of the provisions of this act, declared herein to be misdemeanor, shall be punished by a fine not exceeding two hundred and fifty dollars nor less than ten dollars, or by imprison-

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ment in the county jail not exceeding six months, or by both such fine and imprisonment.

"Section 69. *Appropriations.*—There is hereby appropriated out of any moneys in the general fund of the State treasury not otherwise appropriated the sum of $10,000 annually, or so much thereof as may be necessary for the payment of the salaries and expenses incurred by the Board of Control under the provisions of this act.

"There is hereby appropriated out of any moneys in the general fund of the State treasury not otherwise appropriated the sum of $5,000 annually, or so much thereof as may be necessary for the salary and expenses of the State Engineer, and the services of assistants, and expenses of the office and department of the State Engineer, which appropriation is in addition to the $5,000 annual appropriation heretofore made in chapter 228, Session Laws of 1905.

"All salaries and expenses incurred, and material and supplies furnished under the provisions of this act shall be paid at the same time and in the same manner as those of other officers of the State.

"Section 70. *Vested Rights Preserved*—

"1. Nothing in this act contained shall impair the vested right of any person, association or corporation to the use of water.

"2. Actual application of water to beneficial use prior to the passage of this act by or under authority of any riparian proprietor, or by or under authority of his or its predecessors in interest, shall be deemed to create in such riparian proprietor a vested right to the extent of the actual application to beneficial use; *provided*, such use has not been abandoned for a continuous period of two years.

"3. And where any riparian proprietor, or under authority of any riparian proprietor or his or its predecessors in interest, any person or corporation shall, at the time this act is filed in the office of the Secretary of State, be engaged in good faith in the construction of works for the application of water to a beneficial use, the right to take and use such water shall be deemed vested in such riparian proprietor; *provided*, such works shall be completed and said water devoted to a beneficial use withiu a reasonable time after the passage of this act. The Board of Control, in the manner hereinafter provided, shall have power and authority to determine the time within which such water shall be devoted to a beneficial use. The right to water shall be limited to the quantity actually applied to a beneficial use within the time so fixed by the Board of Control.

"4. Nor shall anything in this act contained affect relative priorities to the use of water between or among parties to any decree of the courts rendered in causes determined or pending prior to the taking effect of this act.

"5. Nor shall the right of any person, association or corporation, to take and use water be impaired or affected by any of the provisions of this act where appropriations have been initiated prior to the filing of this act in the office of the Secretary of State, and such appropriators, their heirs, successors or assigns,. shall, in good faith and in compliance with laws existing at the time of filing this act in the office of the Secretary of State, commence the construction of works for the application of the water so appropriated to a beneficial use, and thereafter prosecute such work diligently and continuously to completion, but all such rights shall be adjudicated in the manner provided in this act.

"6. The Board of Control shall have authority, and shall for good cause, shown upon the application of any appropriator, or user of water under an appropriation of water made prior to the passage of this act, or in the cases mentioned in subdivisions 3 and 5 of this section, where actual construction work has been commenced prior to said time or within the time provided in law existing at the time of filing this act in the office of the Secretary of State, to prescribe the time within which the full amount of the water appropriated shall be applied to a beneficial use, and in determining said time shall grant a reasonable time after the construction of the works, or

canal, or ditch, used for the diversion of the water, and in doing so shall take into consideration the cost of the appropriation and application of such water to a beneficial purpose, the good faith of the appropriator, the market for water or power to be supplied, the present demands therefor, and the income or use that may be required to provide fair and reasonable returns upon the investment. Upon making such order the Board of Control shall direct the State Engineer to issue a certificate showing such determination. For good cause shown the Board of Control may extend the time by granting further certificates.

"7. And where appropriations of water heretofore attempted have been undertaken in good faith, and the work of construction or improvement thereunder has been in good faith commenced and diligently prosecuted, such appropriations shall not be set aside or avoided, in proceedings under this act, because of any irregularity or insufficiency of the notice by law, or in the manner of posting, recording, or publication thereof.

"8. All rights granted or declared by this act shall be adjudicated and determined in the manner and by the tribunals as provided in this act. This act shall not be held to bestow upon any person, association or corporation, any riparian rights where no such rights existed prior to the time this act takes effect.

"Section 71. *Portland Water Supply.*—The exclusive right to the use of the waters of Bull Run and Little Sandy rivers is hereby granted to the city of Portland, and all rights to the waters of the lakes, rivers and streams of this State heretofore acquired for the purposes of municipal water supply are hereby confirmed, and no rights which shall be acquired under this act shall impair the rights of any municipal corporation to waters heretofore taken. The Board of Control shall reject or grant, subject to municipal use, all applications where, in its judgment, the appropriation of the waters applied for impair a municipal water supply. It shall be the duty of municipal corporations of the State, on request of the State Engineer, to furnish to him a statement of the amount and source of the municipal water supply, with probable increase or extension of the same; *provided,* that this act shall not be deemed or held to and shall not impair the rights of any person, association or corporation who may, at and prior to the time this act is filed in the office of the Secretary of State, have any vested right to or valid appropriation or *bona fide* notice of appropriation of the waters of either the Bull Run or the Little Sandy River, under laws heretofore in effect or under any valid contract or deed of conveyance heretofore made with or by the city of Portland.

"Section 72. *Eminent Domain.*—The United States, the State, or any person, foreign or domestic corporation or association, may exercise the right of eminent domain to acquire for a public use any property or rights now or hereafter existing when found necessary for the application of water to beneficial uses, including the right to enlarge existing structures and use the same in common with the former owner. Any right of way so acquired shall be so located as to do the least damage to private or public property, consistent with proper and economical engineering construction. Such property or rights may be acquired in the manner provided by law for the taking of private property for public use.

"The right to conduct water from or over the land of another for any public use, including the right to raise any water by means of dams, reservoirs, or embankments to a sufficient height to make the same available for the use intended, and the right to any and all land necessary therefor, may be acquired upon payment of just compensation in the manner provided by law for the taking of private property for public use.

"Section 73. *Repeal.*—All laws and parts of laws so far as in conflict or inconsistent with the provisions of this act are hereby repealed.

"Section 74. *Emergency.*—WHEREAS, there is great uncertainty existing throughout the State with reference to the water-rights of various parties along the streams, ditches and waterways as to their several interests therein, entailing expensive litigation

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and engendering many animosities and much bad blood, thereby endangering the public peace and safety of many sections of the State, and WHEREAS, it is urgent that these conditions be remedied for the preservation of the public peace, health and safety of the State, this act shall be in full force and effect from and after its approval by the governor.

"Filed in the office of the Secretary of State February 24, 1909."

Water-power. *(Chapter 221, Laws of 1909.)*—"An act providing for granting franchises of water-power by the State, and collecting fees therefor.

"*Be it enacted by the People of the State of Oregon:*

"Section 1. All water within the State from all sources of water supply belong to the public.

"Section 2. That every person, firm or corporation except municipal corporations (hereinafter called the appropriator), who shall appropriate water after the passage of this act, for the purpose of applying the same to the development of power, shall during the life of such appropriation as fixed herein pay to the State of Oregon not less than twenty-five cents or more than two dollars per annum in advance, on or before the second day of January of each year, for each and every horse-power represented by the said appropriation. The amount of the payment shall be determined by the Board of Control and adjusted from time to time, based upon the percentage of power appropriated which is put to beneficial use. For the purpose of this act, a horse-power is hereby defined to be 550 pounds of water per second of time for each foot of available fall.

"Section 3. The appropriator shall pay to the Board of Control the fees required by section 2 of this act, proportionate to the remainder of the current year, and no appropriation of water for power purposes shall be deemed complete until such payment of fees is made. Immediately upon the receipt of such fees the Board of Control shall pay them over to the State treasurer, taking his receipt therefor, who shall place the same in the general fund of the State treasury. On or before the second day of January of each year thereafter, every appropriator of water for power purposes shall forward to the Board of Control the fees provided for in section 2 of this act.

"Section 4. Upon the completion of the appropriation of water for power purposes, as now or hereafter provided by law, and compliance with the provisions of this act, the appropriator thereof shall own and enjoy all of the uses thereof so long as he pays the annual fees therefor, herein required, for a term not exceeding forty years from the date of appropriation and shall have a preference right to reappropriate such water under such conditions as may be prescribed by law at the expiration of such term of years provided all fees have been paid. If any appropriator shall fail to pay any annual fee, or shall fail or refuse to renew the appropriation at its expiration, the State shall have a preference lien therefor prior to all other liens or claims, except for taxes, upon the improvements of the appropriator for developing and applying such appropriation of water and the real estate upon which the same are located, and upon notice from the Board of Control, the Attorney General shall proceed to foreclose the lien and collect any unpaid fees in the same manner as other liens or real property are foreclosed, and the water shall be again subject to appropriation.

"Section 5. Any person, firm or corporation who believes himself or itself injured in any material right by any decision of the Board of Control shall have the right of appeal from such decision to the circuit court for the county in which the proposed appropriation of water is situated.

"Section 6. In case the Board of Control is not created by law, with power to supervise the appropriation, distribution and use of the water of

the State, then the duties imposed upon the Board of Control, as prescribed in this act, shall devolve upon and be assumed by the State Engineer.

"Filed in the office of the Secretary of State February 24, 1909."

Laws of 1911.

Statutes of 1911, chapter 324, page 404. "An act relating to the issuance of permits for the appropriation of water where the works to be constructed under such permits or the point of diversion or place of intended use, are situated without the State of Oregon.

"Be it enacted by the Legislative Assembly of the State of Oregon:

"Be it enacted by the People of the State of Oregon:

"Section 1. That no permit for the appropriation of water shall be denied because of the fact that the point of diversion described in the application for such permit, or any portion of the works in such application described and to be constructed for the purpose of storing, conserving, diverting or distributing such water, or because the place of intended use or the lands to be irrigated by means of such water, or any part thereof, may be situated in some other State, but in all such cases where either the point of diversion or any of such works or the place of intended use, or the lands, or part of the lands, to be irrigated by means of such water, are situated within the State of Oregon, the permit shall issue as in other cases; *provided, however,* that the State Engineer may in his discretion, decline to issue a permit where the point of diversion described in the application is within the State of Oregon but the place of beneficial use in some other State, unless under the laws of such State water may be lawfully diverted within such State for beneficial use in the State of Oregon.

"Filed in the office of the Secretary of State February 23, 1911."

Statutes of 1911, chapter 236, page 418. "An act providing for the payment of an annual license fee to the State by claimants to the use of water for power purposes where the water was applied to power generated prior to the twenty-second day of May, 1909, with suitable penalties for failure to pay the same, and providing the manner for collecting the same.

"Be it enacted by the People of the State of Oregon:

"Be it enacted by the Legislative Assembly of the State of Oregon:

"Section 1. Every person, firm, corporation or association hereinafter called 'claimant,' claiming the right to the use of water for power development where said water was applied to the development or generation of power, and the power generated thereby prior to the twenty-second day of May, 1909, shall on or before the first day of January, 1912, and on or before the first day of January of each year thereafter, pay to the State of Oregon, in advance, an annual license fee based upon the theoretical water horse-power claimed under each and every separate claim to water, graduated as follows, to wit: Ten cents for each and every theoretical water horse-power up to 100, inclusive; five cents for each and every theoretical water horse-power in excess of 100 and up to and including 1,000; and one cent for each and every theoretical water horse-power in excess of 1,000; *provided, however,* upon filing the statement as hereinafter provided, the United States or the State, or any municipal corporation, claiming the right to the use of water to any extent for the generation of power, or any other claimant to the right to use water for the generation of 25 theoretical water horse-power, or less, shall be exempted from the payment of all fees herein provided.

"Section 2. The fees herein provided shall be paid to the State Engineer in advance, and shall be accompanied by a written statement showing the extent of such claim. Said state-

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ment shall set forth the name and address of the claimant; the name of the stream from which the water is appropriated or claimed for power development; a description of the forty acres, or smallest legal subdivision in which the point of diversion and point of return are located; the date of the right as claimed; the maximum amount of water claimed expressed in cubic feet per second of time; the total average fall utilized under such claim; the manner of developing power, and the use to which the power is applied. If the regular flow is supplemented by water stored in a reservoir, the location of such reservoir, its capacity in acre-feet and the stream from which it is filled and fed, should be given, also the date of the right as claimed, for storage purposes.

"Should any claimant fail or neglect to file such statement within the time specified, or fail or neglect to pay such fees within the time specified, the fees due and payable shall be the amount specified in section 1 of this act increased twenty-five per cent, and the State shall have a preference lien therefor, together with interest at the rate of ten per cent per annum from date of delinquency, upon the property of the claimant used, or necessary for use, in the development of the right or claim, together with any improvements erected thereon for such development, and upon notice from the State Engineer, the attorney general shall proceed to foreclose the lien and collect the amount due, as herein provided, in the same manner as other liens on real property are foreclosed.

"Section 3. The filing of a claim to water in excess of the amount to which the claimant is legally entitled shall not operate to vest in such claimant any right to the use of such excess water, nor shall the payment of the annual license fees, provided for herein, operate to vest in any claimant any right to the use of such water beyond the amount to which claimant is legally entitled. The filing of any such claim to water shall be conclusive evidence as to the abandonment by the claimant of all rights to water for power purposes in excess of the claim as filed.

"Section 4. The amount of theoretical water horse-power upon which fees shall be paid under the provisions of this act shall be computed by multiplying the maximum amount of water claimed, expressed in cubic feet per second, by the average total fall utilized, expressed in feet, and dividing the product by 8.8.

"Filed in the office of the Secretary of State February 23, 1911."

Statutes of 1911, chapter 237, page 420. "An act creating a 'Survey Fund' in the hands of the State treasurer and providing for its use by the State Engineer in making certain surveys and investigations looking to the gathering of data concerning topographic features, stream flow and water-power within the State of Oregon.

"Be it enacted by the People of the State of Oregon:

"Be it enacted by the Legislative Assembly of the State of Oregon:

"Section 1. That all fees paid into the State treasurer [treasury] as license fees which have been collected, as provided by law, from claimants to the use of water for power purposes, where the right was initiated prior to the twenty-second day of May, 1909, shall be credited by the State treasurer to the survey fund, which fund is hereby created. Such fund shall be a continuing fund in the hands of the State treasurer, to be expended under the direction of the State Engineer for the purpose of securing data necessary to encourage the development and use of the water resources of the State, and the State engineer is hereby authorized and directed to establish gauging stations at suitable points on the various streams of the State to determine the daily and seasonal fluctuations in the flow of the water; to make surveys and profiles to determine the fall of streams suitable for power development; and to prepare topographic maps of the territory adjacent to the private streams of the State, so that the availability of water for power,

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irrigation or other beneficial uses, may be determined and made known to the public. All such maps and information shall be made a matter of record in the office of the State Engineer, and he is hereby directed to publish a summary of all such information in the most practical and economical manner for presentation to the public. The State Engineer is hereby authorized and directed to enter into such agreements and contracts as will insure the said surveys and investigations being carried on in the most economical manner, and that the maps and data may be made available to the use of the public as quickly as possible. The State Engineer is hereby authorized to employ assistants and to purchase materials and supplies necessary in carrying out the provisions of this act. All salaries and expenses incurred shall be paid upon properly approved and audited vouchers from the survey fund, to be paid at the same time and in the same manner as State officers are paid.

"Section 2. In order to carry out the purpose of this act, all persons employed hereunder are authorized to enter and cross all lands within the State; *provided*, that in so doing, no unnecessary damage is done to private property.

"Filed in the office of the Secretary of State February 23, 1911."

Statutes of 1911, chapter 238, page 421. "An act to amend section 6596 of Lord's Oregon Laws, the same being section 72 of chapter 216, General Laws of Oregon for 1909, and to declare the cases in which the right of eminent domain may be exercised for the construction and use of rights of way for ditches and other irrigating and drainage works.

"Be it enacted by the People of the State of Oregon:

"Be it enacted by the Legislative Assembly of the State of Oregon:

"Section 1. That section 6596 of Lord's Oregon Laws, the same being section 72 of chapter 216, General Laws of Oregon for 1909, be, and the same is hereby amended so as to read as follows:

"Sec. 6596. The United States, the State, or any person, firm or corporation, shall have the right of way across and upon public, private and corporate lands or other rights of way, for the construction, maintenance, repair and use of all necessary reservoirs, dams, water-gates, canals, ditches, flumes, tunnels or other means of securing, storing and conveying water for irrigation or for drainage, or any other beneficial purpose, upon payment of just compensation therefor. But such right of way shall in all cases be so constructed, obtained, located and exercised in a manner consistent with proper and economical engineering construction, so as not to unnecessarily impair practical use of any other right of way, highway, or public or private road, nor to unnecessarily injure any public or private property. Such right may be acquired in the manner provided by law for the taking of private property for public use.

"Section 2. When the United States, the State, or any person, firm or corporation desires to convey water for irrigation, drainage or for any other beneficial purpose, and there is a canal or ditch already constructed that can be enlarged to convey the required quantity of water, then the United States, the State, or any such person, firm or corporation, or the owner or owners of the land through which a new canal or ditch would have to be constructed to convey the quantity of water necessary, shall have the right to enlarge said canal or ditch already constructed, by compensating the owner of the canal or ditch to be enlarged for the damages, if any, caused by said enlargement; *provided*, that said enlargement may be made at any time between the first day of October and the first day of March, but not any other time, unless upon agreement in writing with the owner or owners of said canal or ditch.

"Filed in the office of the Secretary of State February 23, 1911."

[Laws of 1911]

Statutes of 1911, chapter 239, page 422. "An act appropriating money for surveys in connection with water-right determinations by the Board of Control and fixing the salary of the State Engineer.

"Be it enacted by the People of the State of Oregon:

"Be it enacted by the Legislative Assembly of the State of Oregon:

"Section 1. There is hereby appropriated out of any moneys in the general fund of the State treasury, not otherwise appropriated the sum of $6,900 annually, or so much thereof as may be necessary for the payment of salaries and expenses incurred by the State Engineer in making surveys and investigations in connection with water-right determinations by the Board of Control, and the Secretary of State is hereby authorized and directed to audit all duly approved claims which have been incurred in pursuance of law and the foregoing appropriation, and draw his warrant on the State treasury in payment thereof as provided by section 2624 of Lord's Oregon Laws, as amended by the legislative assembly of 1911.

"Section 2. The State Engineer shall receive a salary of $3,000 per annum, and actual necessary traveling expenses while away from his office in the discharge of official duties, payable as other State officers are paid.

"Section 3. All acts or parts of acts in conflict or inconsistent with the provisions of this act, are hereby repealed.

"Filed in the office of the Secretary of State February 23, 1911."

In 1911 the following further miscellaneous provisions (not included in the statutes above quoted) were enacted: Chapter 256, page 456, concerns condemnation for electric uses; chapter 104, page 148, and chapter 145, page 197, give cities the right to acquire waterworks by condemnation; chapter 80, page 121, gives them the right to serve outside consumers; page 531 is a joint memorial to Congress saying that withdrawals of public land in Oregon are retarding development.

Practical Working of the Oregon Water Law.

(The following statement was prepared for this book in January, 1910, by Hon. John H. Lewis, State Engineer.)

"Thirty millions of dollars to be invested in Oregon in the construction of irrigation, water-power and similar projects shows the confidence of capital in the new laws relating to water. During the last ten months of 1909, four hundred and sixty-four applications for permits to appropriate water were filed with the State Engineer, the total estimate of cost of approved projects as given by the applicants being stated above. The significance of these figures can be appreciated when it is remembered that two million one hundred thousand dollars represent the total cost of all irrigation works built prior to 1902, as shown by the United States census, and six million dollars will doubtless cover all expenditures, including those of the government, on irrigation works since that time. Out of four hundred and sixty-four applications, sixty-two have already been canceled from the records and the water-rights opened for re-entry. Many, if not all, of the remaining applications are undoubtedly *bona fide*, as the applicants have paid to the State a total of nine thousand seven hundred dollars, a sum which fully meets all the expenses of the

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State Engineer's office, including the cost of surveys made in connection with the determination of old water-rights. The benefits of the office are thus secured to the State without cost to the taxpayer.

"During this time forty-nine petitions for the determination of water-rights on various streams of the State have been filed with the Board of Control. The popularity of the law in this respect far exceeded the expectation of the legislature, as the appropriation for the State Engineer's office was so limited that the surveys cannot keep pace with demands. During the past season, all ditches, irrigated lands, power plants, etc., along sixteen streams have been surveyed and mapped at a total cost of four thousand one hundred dollars. Approximately fifty-seven thousand five hundred acres of irrigated land have been measured and the area in each forty-acre tract determined, the cost per acre being seven and one-half cents. The most important of these streams are the Umatilla River and all its tributaries, Crooked River, Squaw Creek and Tumalo Creek in Crook County, Willow Creek in Morrow County, Willow Creek in Malheur County, and Little Butte Creek in Jackson County.

"No orders adjudicating the water-rights of any stream have as yet been entered, but testimony has been taken, submitted for inspection, and contests allowed in six different cases. Because of the great confusion in our courts prior to the passage of this law, it was expected by all that many contests would occur under the new method. If the experience so far is typical, these contests will be very few in number, which is the case in Wyoming adjudications. On one stream the testimony of two hundred claimants was taken, in tabular form and systematic order, in three days. On the Umatilla River there are over one thousand claimants. Testimony on this stream will be completed in probably a week or ten days. The saving to the water user, both in time and cost, in the adjudication of his water-right, is the cause of great satisfaction when he understands the object and purpose of the adjudication.

"The best interest of the public has been considered in a number of important cases. Under the old law, priority in posting a notice determined the right, but under the new law, an application can be denied, if the proposed use is a menace to the safety and welfare of the public. In connection with the Lower Powder Valley Project of sixty thousand acres, in Baker County, the Board of Control has, after fully considering the public interest, directed the State Engineer to approve the permit of the party securing the final contract with the State for the reclamation of these lands under the Carey Act. Two conflicting interests having made applications for the water-right, the one having the subsequent water-right may upon the making of certain surveys, costing about thirty thousand dollars, receive the contract for reclamation. The permit will then be issued to it, a subsequent applicant. An application for all the waters of Hood River, to be used for power development, has been held up pending an investigation as to the public interest in the matter. A tentative agreement has been reached, whereby subsequent diversions of water for the irrigation of lands above the power plant will be permitted.

"It is believed that this great stimulus to irrigation in Oregon is due almost entirely to the favorable water laws, and not to the prospective opening of Central Oregon to railroad transportation. All of the large projects which have recently been initiated are either on present constructed railroads or entirely off the proposed lines. In support of this view, it is stated by representatives of the Trowbridge and Niver Company, who financed a number of large irrigation projects in Idaho, that within three days after the passage of the water code engineering parties were sent out to investigate projects in Oregon, and the taking up of the Malheur Project, of one hundred and fifty thousand acres, by this company is the direct outcome of such investigations.

"JOHN H. LEWIS,
"State Engineer."

Oregon Statutes Construed.—In the earlier parts of this book (Parts I to VII, inclusive) Oregon Statutes are construed or cited upon the following pages:

Hill's Annotated Laws.

Hill's Ann. Laws, p. 1930, secs. 1–9 387

B. & C. Codes, etc.

B. & C. Comp. Stats., sec. 4 626
B. & C. Comp., sec. 3338 233
B. &. C. Ann. Codes, tit. 11, sec. 4993 ..... 1161, 1166
B. &. C. Comp., sec. 5000 ..... 144, 145, 159

Session Laws.

Stats. 1891, p. 52, sec. 12 657
Stats. 1891, p. 52, sec. 13 657
Stats. 1901, p. 136 387
Stats. 1903 (Sp. Sess.), p. 25 387
Stats. 1905, c. 228, pp. 401–405 ..... 153, 387, 1276, 1309, 1319
Stats. 1907, c. 144, sec. 2, p. 287 1319
Stats. 1909, c. 216 ..... 150, 324, 441
Stats. 1909, c. 216, sec. 1 153
Stats. 1909, c. 216, sec. 2 1099
Stats. 1909, c. 216, sec. 8 1098
Stats. 1909, c. 216, sec. 9 1097
Stats. 1909, c. 216, sec. 13 1108
Stats. 1909, c. 216, sec. 24 1117
Stats. 1909, c. 216, sec. 25 1118
Stats. 1909, c. 216, sec. 26 1118
Stats. 1909, c. 216, sec. 33 1119
Stats. 1909, c. 216, sec. 35 1117
Stats. 1909, c. 216, sec. 38 1100
Stats. 1909, c. 216, sec. 39 ..... 1100, 1105
Stats. 1909, c. 216, sec. 43 ..... 733, 1100
Stats. 1909, c. 216, sec. 44 1100
Stats. 1909, c. 216, sec. 45 733
Stats. 1909, c. 216, sec. 53 453
Stats. 1909, c. 216, sec. 54 453
Stats. 1909, c. 216, sec. 55 ..... 542, 1100
Stats. 1909, c. 216, sec. 58 ..... 1237, 1244
Stats. 1909, c. 216, sec. 59 44
Stats. 1909, c. 216, sec. 61 345
Stats. 1909, c. 216, sec. 65 ..... 296, 551, 589
Stats. 1909, c. 216, sec. 66 733
Stats. 1909, c. 216, sec. 67 1100
Stats. 1909, c. 216, sec. 68 1100
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Stats. 1909, c. 221, sec. 1..... 194
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Stats. 1911, c. 172, p. 256.....379, 1173, 1263
Stats. 1911, c. 223, p. 378.....1263
Stats. 1911, c. 224, p. 404.....365, 444, 445
Stats. 1911, c. 236, p. 418..... 442
Stats. 1911, c. 238, p. 421..... 657
Stats. 1911, c. 241, p. 424.....379, 1263
Stats. 1911, c. 265, p. 456 651
Stats. 1911, c. 279, p. 483.....1197
Stats. 1911, c. 279, p. 483, sec. 7.....1186, 1191
Stats. 1911, c. 279, p. 483, sec. 9.....1207
Stats. 1911, c. 483, sec. 43.....1190
Stats. 1911, p. 531..... 166

(3d ed.)
§ 1444. PHILIPPINE ISLANDS.

The Spanish Philippine Code contained in articles 407 to 425 the usual civil-law provisions concerning waters. Article 414 provided: "No one may enter private property in search of waters, or make use of them without permission from their owners," which must have had the result of restricting the use to riparian proprietors. A translation of this code was issued by the United States War Department.

32 United States Statutes at Large, 677, 704. Concerning Philippines.—"Beneficial use shall be the basis, the measure, and the limit of all rights to water in said islands." A common phrase in the States rejecting riparian rights *in toto* (page 697). Sections 2339 and 2340, Revised Statutes of the United States, are substantially enacted for the Philippines (page 704) as follows:

"An act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes." Approved July 1, 1902, 32 Stat. 691, 697, 704, c. 1369 (quoted here in part relating to waters).

"*Sec. 19.* That the beneficial use shall be the basis, the measure, and the limit of all rights to water in said islands, and the government of said islands is hereby authorized to make such rules and regulations for the use of water, and to make such reservations of public lands for the protection of the water supply, and for other public purposes not in conflict with the provisions of this act, as it may deem best for the public good."

"*Sec. 50.* That whenever by priority of possession rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same, and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed, but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

"*Sec. 51.* That all patents granted shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water-rights as may have been acquired under or recognized by the preceding section."

There is nothing of importance in the Philippine Reports.

Certain lands held to be padagat and not binanbang! Relova v. Lavarez, 9 Philippine Rep. 149. Prescriptive right upheld (*Ibid.*). Contract regarding water construed (Acosta v. Domingo, 9 Philippine Rep. 290). Right of way over private land for water can be obtained only by condemnation making compensation (Ayala de Roxas v. City of Manila, 9 Philippine Rep. 215).

In the acts of the Philippine Commission, Act 1120, section 19, regarding sale of "Friar Lands," the control of irrigation and irrigation works on these lands is reserved entirely to the Philippine government. There are various acts of the commission which should be consulted regarding the public domain; e. g., Act 667, section 12, and Act 926, sections 75 and 76.

Proposed Legislation.—In 1910 Professor Albert E. Chandler, a member of the faculty of the University of California, at the request of Director Newell of the United States Reclamation Service, investigated irrigation conditions in the Philippines. From an article contributed by him to the California Journal of Technology (vol. 17, p. 11), it appears that the Philippine commission has at various times appropriated considerable sums for irrigation projects. Previous to February 1, 1907, the work was carried on by the hydraulic engineer of the Bureau of Public Works. On April 1, 1908, an Irrigation Engineer was appointed, and in June, 1908, a Division of Irrigation was created in the Bureau of Public Works (Act No. 1854). Since then the energies of the officials have been devoted to collection of information upon which projects may be based. The law (Act No. 1854) provided that persons using the water shall reimburse the government within a given number of years (not exceeding twenty) for all money expended, and that the charges shall be a lien upon their property.

Mr. Chandler, in conjunction with Mr. H. B. Kirkpatrick, then Chief of the Irrigation Division of the United States Department of Agriculture, prepared a general code based upon that of Nevada, the Wyoming code not being brief enough to meet the conditions.

With regard to the draft prepared: "The draft as suggested provides for the creation in the Bureau of Public Works of a Division of Irrigation, at

whose head shall be a Chief Irrigation Engineer, to be appointed by the Secretary of Commerce and Police. The draft provides that the Chief Irrigation Engineer shall be at the head of the irrigation organization, with duties the same as those of the State Engineer of Nevada. Subject to the approval of the Secretary of Commerce and Police, he is to have charge of the determination of existing water-rights, the distribution of water in times of scarcity and also of new applications for the appropriation of water. In addition, we drafted an act to provide for surveys and the construction, maintenance and operation of irrigation projects by the government of the Philippine Islands, and for the repayment of the money expended therein. This suggested act was designed to take the place of the one which failed to pass at the last session of the Philippine legislature. It provides for the examination of possible irrigation projects and for their construction by the government when found feasible by the Secretary of Commerce and Police and approved by the governor general. It provides that proper notice shall be given by the Secretary of Commerce and Police, and that the owners of any land included within the project shall be allowed sixty days to file with the governor general their objections to the construction of the project and other points. Power of final decision is given to the governor general, with the proviso that no project shall be constructed if the owners of one-half of the irrigable land under such project object to its construction. The act further provides that all installments unpaid at the date specified in a public notice shall become liens against the irrigable land."

The proposed draft was submitted to the legislature in 1910, but did not pass. There has been no legislation since then upon this subject.

An interesting point in Mr. Chandler's article is that "The natives in any locality are generally controlled by a single, or, at most, by a few individuals, so that the result of any election would depend upon the attitude of these few influential citizens."

(3d ed.)
§ 1445. SOUTH DAKOTA.

Declaration of public ownership.
Concerning riparian rights.
Ditches on private land—Eminent domain.
Administration.
Determination of existing priorities.
Method of appropriating.
Fees of State Engineer.
Duty and measurement of water.
Public service—Water companies and consumers.
Miscellaneous.
Practical working of the South Dakota water law.
South Dakota statutes construed.

References are to the Statutes of 1907, page 373, chapter 180 (Revised Codes, Political Code, section 2563 et seq.), unless otherwise stated; this statute having replaced a code enacted in Laws of 1905, page 201, chapter 132, substantially the same.

The act of 1905 applied only to irrigation, and the change was to make it apply to all uses. Previous to this statute there had been little legislation upon the subject in South Dakota. The office of State Engineer existed (Annotated Codes 1899, sec. 2802 et seq.); and there had been considerable legislation concerning waters obtained from artesian wells (*Ibid.*, secs. 27, 54 et seq.). Previous to the statute of 1905, the law of South Dakota in this connection was contained in Grantham's Annotated Statutes of 1899, section 2687 et seq. Posting and recording notices was provided as in California. In the western part of the State, irrigation began in the late seventies and early eighties. The eastern part has not required irrigation.

There is nothing in the State Constitution upon the subject.

Text, §§ 6, 170.

Declaration of Public Ownership.—All waters within the State are declared in section 1 to belong to the public, and are subject to appropriation. (Stats. 1907, p. 373, sec. 1.)

Text, § 117.

Concerning Riparian Rights.—The South Dakota statutes of 1905 and 1907 contain the usual provisions to the effect that all waters within the State are subject to appropriation (Stats. 1907, sec. 1), and that beneficial use shall be the basis, the measure and the limit of all rights to the use of water (Stats. 1907, sec. 2), and that appropriation gives the better right, and that all rights must hereafter be obtained under this statute (Stats. 1907, sec.

[Concerning Riparian Rights]

2). The courts have in the past upheld the common-law riparian rights of private land, following the California system.

The Colorado statute declaring that all landowners on the banks of a stream have a right to use the water for irrigation was early copied in South Dakota as well as North Dakota.

"The owner of the lands owns the waters standing thereon or flowing over or under its surface, but not flowing in a definite stream. Water running in definite stream formed by nature over or under the surface may be used by him as long as it remains there, but he may not prevent the natural flow of the stream or of the natural springs from which it commences its definite course, nor pursue nor pollute the stream." Revised Code of 1903, sec. 278.

"Any person or persons, corporation or company, who may have or hold a title or possessory right to any mineral or agricultural lands within the limits of this State shall be entitled to the usual enjoyment of the waters of the streams or creeks in said State for mining, milling, agricultural, or domestic purposes: Provided, that the right to such use shall not interfere with any prior right or claim to such waters when the law has been complied with in doing the necessary work." Annotated Statutes of 1899, sec. 2687; Rev. Codes, Pol. Code, sec. 2563.

Cf. the provision in the Statutes of 1907, page 382, section 31: "Any person, association or company who may have or hold any possession, right or title to any agricultural lands within the limits of this State shall be entitled to the usual enjoyment of the waters of the streams or creeks of said State." See, also, Stats. 1911, c. 263, sec. 468.

In this State it was held declaratory of the common law of riparian rights. (See text, § 119.)

Text, c. 10.

Ditches on Private Land—Eminent Domain.—Ditches can be built on private land only by condemnation, and any beneficial use is *(semble)* a public use. Section 3 of the Act of 1907, chapter 180, is as follows: "The United States, the State, or any person or any private or public corporation, or any association of persons may exercise the right of eminent domain to acquire as a public use any property or rights now or hereafter existing when found necessary for the application of water to beneficial uses, including the right to enlarge existing structures and to use the same in common with the former owner. Any canal right of way so acquired shall be so located as to do the least damage to private or public property, consistent with proper and economical engineering construction. Such property or rights may be acquired in the manner provided by law for the taking of private property for public use."

See Political Code, section 2564.

Text, c. 49.

Administration.—The State Engineer is appointed (sec. 5), with general duties and powers of supervision over the waters of the State, and to make surveys and collect all data available (secs. 5, 12 and 31). He may examine all works (secs. 27, 28). The office of Assistant State Engineer is likewise created (sec. 6). Three water divisions are created by this statute (sec. 38), with one water commissioner for each appointed by the governor (sec. 38 et seq.). The State Engineer and the water commissioners shall together form the Board of Water Commissioners and have general supervision and control over waters of the State, adopting rules and regulations, etc. (sec. 41). The water divisions may be subdivided into water districts by the State Engineer, as it becomes advisable (sec. 43).

Police regulations exist in the usual way. Disobeying the orders of the State Engineer (sec. 28), or failure to maintain headgates and other devices (sec. 50), waste of water (sec. 52), and similar matters, are made misdemeanors; and the penalties therefor are specified in sections 54, 55.

Text, c. 51.

Determination of Existing Priorities.—The State Engineer is required to make a complete survey of the waters of the State (sec. 14), and to furnish the data collected to the attorney general, whose duty it then is to bring suit in the name of the State to determine the rights upon the stream, unless suit has already been begun by private parties (sec. 15). First pleadings in private suits must be filed with the State Engineer, who may order the attorney general to intervene (Stats. 1907, p. 373, sec. 15); and all known owners shall be made parties in every suit (sec. 16, *semble*). The usual provisions for the conduct of the suit are provided and the court may appoint a referee (sec. 34). The decree must state certain specified details concerning the rights of all users of water on the stream, and one copy thereof must be filed in the office of the State Engineer, and the other copy with the water commissioner of the water division in which the stream lies (sec. 18).

Text, c. 18.

Method of Appropriating.—Before beginning work, application must be made to the State Engineer for a permit (sec. 19). Beginning work without making such application is a misdemeanor

[Method of Appropriating]

(sec. 52). The State Engineer will furnish blanks on which applications are to be made, and may require such general information as he deems necessary (sec. 19). Notice of application is published in a newspaper (sec. 21), and an examination is made by the State Engineer; if he approves he indorses his approval upon the application, which constitutes a permit to proceed (sec. 22). If he rejects the application, an appeal lies therefrom (sec. 23). The work must be prosecuted with diligence (sec. 24). It must be completed within five years (sec. 20), but the State Engineer may specify a shorter time (sec. 22), or may extend the same three years (sec. 22 et seq.). One-fifth of the work must be completed in one-half the time specified by the State Engineer (sec. 24). On completion of the work an examination is made by the State Engineer, and if all is satisfactory a certificate of completion issues (sec. 26). Actual application and use of the water must follow within four years after the completion of the work (sec. 22), unless the State Engineer specifies a shorter time, or a longer time not exceeding two years additional (sec. 22 et seq.). Upon notice and examination of the actual use of the water at the end of the time specified, a license issues, which is the final certificate (sec. 29).

The priority of right dates from the time of filing original application (secs. 2, 20); and from initiation of claim as to those initiated before passage of the act (sec. 2).

Flood Waters.—Under the Act of 1911, chapter 263, page 468 (amending Laws of 1907, chapter 180, section 31), one may appropriate dry-draws or watercourses not flowing over twenty miner's inches during the greater part of the year, by filing a location certificate with the county register of deeds and posting a copy thereof at or near the head of the proposed dam, ditch, etc., and mailing a copy thereof to the State Engineer (fee, one dollar). Work must begin within sixty days and be diligently prosecuted. Such appropriations are declared not subject to the jurisdiction of the State Engineer. When completed, a verified petition (with witnesses and corroborative affidavits) may be filed with the State Engineer (fee, two dollars), stating the work done and the use made and other matters, and if the statement conforms to the location certificate he is to issue a certificate of appropriation to the applicant, which is declared *prima facie* evidence of a valid water-

[Method of Appropriating]

right. Notices heretofore given may come under this act, filing, with the petition, a location notice upon the form adopted under this act.

Fees of State Engineer.—Statutes of 1907, section 10. "The State Engineer shall receive the following fees, to be collected in advance and to be paid by him into the general fund of the State treasury on the first Monday of January, April, July, and October of each year:

"(a) For filing and examining an application for permit to construct a dam across a dry watercourse for the purpose of collecting storm water and of applying the same to beneficial use, one dollar. (b) For filing and examining an application for permit to appropriate water, map and field-notes of same, which shall include the filing of proofs of publication and all other papers relating to the application up to the recording of the permit to appropriate water, five dollars. (c) For recording any permit, certificate of construction or license issued, or any other water-right instrument, one dollar for the first hundred words, and fifteen cents for each additional hundred words or fraction thereof. (d) For filing any other paper, one dollar. (e) For issuing certificates of construction or licenses to appropriate water, one dollar each. (f) For making copy of any document recorded or filed in his office, fifteen cents for each hundred words or fraction thereof. (g) For blue-print copy of any map or drawing, ten cents per square foot or fraction thereof. For other copies of drawings, actual cost of the work. (h) For certifying to such copies, one dollar for each certificate. (i) For examining, in connection with water-right applications, plans and specifications for any dam, not exceeding ten feet in extreme height from the foundations, ten dollars; for a dam higher than ten feet and not exceeding thirty feet, twenty dollars; for a dam higher than thirty feet and not exceeding fifty feet, thirty dollars; for a dam higher than fifty feet, fifty dollars; or for a canal or other water conduit of an estimated capacity exceeding fifty and not more than one hundred cubic feet per second, twenty dollars; for an estimated capacity exceeding one hundred cubic feet per second, thirty dollars. (j) For inspecting dam sites and construction work when required by law, or when necessary in the judgment of the State Engineer, ten dollars per day and actual and necessary traveling expenses. The fees for any inspection deemed necessary by the State Engineer and not paid on demand shall be a lien on any land or other property of the owner of the work, and may be recovered by the State Engineer in any court of competent jurisdiction. (k) For rating ditches or inspecting plans and specifications of works for the diversion, storage and carriage of water, at the request of private parties, not in connection with an application for right to appropriate water, actual cost and expenses; and the State Engineer shall attach his approval to such plans and specifications if found satisfactory. (l) For such other work as may be required of his office, the fees provided by law. (m) In ascertaining actual cost of any work, as the term is used in this section, the salary of any salaried officer for the time employed shall be included."

Text, §§ 486, 487.

Duty and Measurement of Water.—The second-foot is the unit of measurement by time and the acre-foot by volume, and the

[Duty and Measurement of Water.]

miner's inch is declared equivalent to one-fiftieth of a second-foot (sec. 45). If the appropriation is for irrigation, the maximum allowed shall be one second-foot for each seventy acres irrigated (Stats. 1907, p. 373, sec. 47).

Text, Part VII.

Public Service—Water Companies and Consumers.—The Statutes of 1907, chapter 180, contain the following:

Section 19, among other things, provides: "The owners of works proposing to store or carry water in excess of their needs for beneficial use, may make application for such excess and shall be held as trustees of such right for the parties applying the water to a beneficial use, and shall be required to sell water-rights for a reasonable price and to furnish the water for such parties at reasonable rates for storage, or carriage, or both, as the case may be." (See, also, section 35.) Section 36 provides: "The owner or owners of any works for the storage, diversion, or carriage of water, which contain water in excess of their needs for irrigation or other beneficial use for which it has been appropriated, shall be required to deliver such surplus, at reasonable rates for storage, or carriage, or both, as the case may be, to the parties entitled to the use of the water for beneficial purposes. In case of the refusal of such owner or owners to deliver any such surplus water at reasonable rates as determined by the State Engineer, they may be compelled to do so by the circuit court for the county in which the surplus water is to be used."

Miscellaneous.—Section 56 provides as follows: "All liens on the land provided for in this act shall be superior in right to all mortgages or other encumbrances placed upon the land and the water appurtenant thereto, or used in connection therewith, after the passage of this act."

The water-right is appurtenant to the land where it is used (sec. 2), and passes with the land on a sale (sec. 32), and can be transferred to other land only under the restrictions of application to the State Engineer and publication of notice in a newspaper (secs. 31, 49). Nonuser for two years was ground for forfeiture of right in the Statutes of 1905 (sec. 45), but the period is three years in the Statutes of 1907, page 373, section 46. Concerning city waterworks, see Statutes of 1907, page 486.

[Miscellaneous]

Purpose of use cannot be changed (sec. 46, *semble*, but see sec. 49). Point of diversion may be changed, subject to approval of State Engineer, and only if no one is injured (secs. 20, 49). The State Engineer may grant permits to use water seeping from another's works just as from natural sources (sec. 57). Recapture of water artificially added to a stream is subject to the control of the State Engineer (sec. 4). Licenses to appropriate may be assigned, and assignments must, to bind *bona fide* purchasers, be recorded with the State Engineer (sec. 32).

Regarding rights of way over State lands, see Stats. 1907, c. 180, p. 373, sec. 58; Stats. 1911, c. 262, p. 467; appropriations by the United States, Stats. 1907, c. 180, sec. 37; water users associations, Laws 1907, c. 132; 1909, c. 174, p. 155 (repealing 1905, c. 132, in order to give full effect to the 1907 statute); drainage of State lands, Stats. 1911, cc. 129, 130, 131.

Practical Working of the South Dakota Water Law.

(The following statement was prepared for this book in January, 1910, by Hon. Samuel H. Lea, State Engineer.)

"A period of four years has elapsed since the enactment of the water code in South Dakota and the inauguration of the present State water administration. The first State Engineer began active duties April 1, 1906, and proceeded at once to formulate the necessary rules and regulations for the work of his department and, in other ways, to carry out the requirements of the law. The State was divided into three grand divisions, known as water divisions; two of these divisions lie west of the Missouri River, the portion of the State east of the Missouri forming the third water division. Each water division is subdivided into water districts; these are designated by names and comprise one or more distinct stream systems in each district. An Assistant State Engineer was appointed and was assigned the duty of conducting hydrographic surveys of the various stream systems. This work is carried on continuously; field work is done during the spring, summer and fall months, and in winter the field-notes are platted on sheets of uniform size for permanent record. Several of the more important streams that are used for irrigation have been surveyed and carefully platted.

"The revised water code requires regulation and supervision by the State Engineer over water appropriations for power purposes, and other beneficial uses, as well as for irrigation. Many permits have been obtained for water-power appropriations under this law in the Black Hills. In most cases the power plants are located on the upper reaches of streams and in such cases the water, after being utilized for power, is returned to the channel for further use lower down stream. In some instances the same water is used more than once in its flow, for generating power in a stream. Farther down the valley, where the agricultural lands lie, the water is used for irrigation. In the eastern part of South Dakota, where irrigation is not practiced, the appropriations of water have been made for power purposes. At Sioux Falls a large development has been made on the Big Sioux River. A plant capable of generat-

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ing 3,000 horse-power has been constructed and is now in successful operation.

"The experience of the first four years of the South Dakota water administration is, on the whole, quite satisfactory. At first considerable opposition was manifested toward the fancied restrictions imposed; this was largely by people who sought to uphold the doctrine of riparian rights. Since, however, the necessity of some central regulation of water-rights in this State has become apparent, this opposition has greatly diminished. The fairness with which the water law has been administered and the protection against unjust claims which has been afforded water users have served to convince the public of the usefulness of this law. A practical illustration of its application is afforded in the large power development at Sioux Falls above referred to. The company having this matter in charge made an effort to place their securities with leading financiers for the purpose of raising funds for construction purposes, and the advice of an eminent attorney was asked concerning the safety of the proposition. His reply was to the effect that, since the company had obtained a State water-right, they were protected by the State against possible adverse claimants. He went further and said that he would not have recommended the handling of the securities but for the State water-right that had been obtained.

"It is believed that the water law, in its essential features, has come to stay in South Dakota. There will probably be minor changes from time to time to conform to local conditions, but the principles established by the law will be maintained."

[May, 1911, Mr. Lea, speaking of the new act concerning appropriation of flood waters, says:]

"This enactment is for the purpose of enabling settlers on desert claims to furnish the United States Land Office with official proof of a State water-right. It is an attempt to improve section 31 of chapter 180 of the Session Laws of South Dakota of 1907. This section was placed in the water code of South Dakota against my advice and protest; it was intended to make easier the process of obtaining a water-right upon a dry-draw and to lessen the expense to the applicant. It was claimed that new settlers should be assisted as much as possible in efforts to obtain water-rights in semi-arid sections where there were no running streams and where it would be necessary to construct dams to impound the storm-waters. A bad defect in this section lies in the fact that it is not definite and does not afford the appropriator under its provisions adequate protection in any rights he may obtain thereunder. For example, a settler may construct a dam under the provisions of said section 31 and at the time of the construction be afforded a large area of watershed above the dam for the collection of storm water. Some time later on, later settlers may come in and build dams across the same draw at points higher up, and thus cut off the prior appropriator from a considerable area of watershed that he had previously enjoyed. Under

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the law in its present condition, there is no recourse for the prior settler, who is obliged to take chances of having his watershed diminished appreciably, and, in some cases, almost entirely cut off.

"Outside of the application of section 31, above referred to, the water code of South Dakota has afforded excellent satisfaction in its operations. A period of five years has elapsed since the enactment of the water code, and the administration of same has been conducted satisfactorily. There have been only two instances of appeals from the decision of the State Engineer regarding water-rights on running streams; one of these appeals has been taken to the State supreme court and the decision of the State Engineer has been upheld therein, as well as by the circuit court in which it was first tried. The other appeal is not being actively pushed, and it is probable that the matter will be allowed to drop after the appellants have become satisfied of the fairness of the decision of the State Engineer."

South Dakota Statutes Construed.—In the earlier parts of this book (Parts I to VII, inclusive) South Dakota Statutes are construed or cited upon the following pages:

Revised Codes, 1905.

Rev. Codes, sec. 278 ..... 139, 144
Rev. Codes, sec. 2563 144
Rev. Codes, sec. 2564 249
Rev. Codes, sec. 2680 ..... 1037, 1072
Rev. Codes 1903, C. C., sec. 43 629

Session Laws.

Stats. 1905, p. 201, sec. 1 194
Stats. 1905, p. 201, sec. 2 ..... 309, 453, 504
Stats. 1905, p. 201, sec. 4 38
Stats. 1905, p. 201, sec. 19 1161
Stats. 1905, p. 201, sec. 20 453
Stats. 1905, p. 201, sec. 28 733
Stats. 1905, p. 201, sec. 31 ..... 551, 587
Stats. 1905, p. 201, sec. 35 1161
Stats. 1905, p. 201, sec. 36 ..... 1276, 1309, 1319
Stats. 1905, p. 201, sec. 44 521
Stats. 1905, p. 201, sec. 45 620
Stats. 1905, p. 201, sec. 46 523
Stats. 1905, p. 201, sec. 47 ..... 551, 587
Stats. 1905, p. 201, sec. 48 549

Session Laws—Continued.

Stats. 1905, p. 201, sec. 49 733
Stats. 1905, p. 201, sec. 54 733
Stats. 1905, p. 201, sec. 55 578
Stats. 1905, p. 201, sec. 56 50
Stats. 1905, p. 201, sec. 58 1319
Stats. 1907, c. 180 ..... 144, 605, 733, 1098
Stats. 1907, c. 180, sec. 1 194
Stats. 1907, c. 180, sec. 2 ..... 309, 425, 503, 587
Stats. 1907, c. 108, sec. 3 657
Stats. 1907, c. 180, sec. 4 ..... 38, 44
Stats. 1907, c. 180, sec. 15 691
Stats. 1907, c. 180, sec. 19 1181
Stats. 1907, c. 180, sec. 23 ..... 339, 444
Stats. 1907, c. 180, sec. 28 490
Stats. 1907, c. 180, sec. 31 ..... 296, 438
Stats. 1907, c. 180, sec. 32 584
Stats. 1907, c. 180, sec. 36 ..... 1153, 1181
Stats. 1907, c. 180, sec. 37 ..... 1276, 1309, 1319
Stats. 1907, c. 180, sec. 38 1099
Stats. 1907, p. 180, sec. 45 521
Stats. 1907, c. 180, sec. 46 ..... 556, 620
Stats. 1907, c. 180, sec. 47 523
Stats. 1907, c. 180, sec. 48 551
Stats. 1907, c. 180, sec. 49 296
Stats. 1907, c. 180, sec. 50 1100
Stats. 1907, c. 180, sec. 54 1100
Stats. 1907, c. 180, sec. 56 578
Stats. 1907, c. 180, sec. 57 50
Stats. 1907, c. 180, sec. 58 233
Stats. 1907, c. 222, p. 285 44
Stats. 1909, c. 102 ..... 375, 378
Stats. 1909, p. 155 1309
Stats. 1911, c. 189, p. 231 940
Stats. 1911, c. 263, p. 468 ..... 381, 438

(3d ed.)

§ 1446. TEXAS.

Waters "are hereby declared to be the property of the public, and may be acquired by appropriation for the uses and purposes hereinafter provided." (Sayles' Civ. Stats. 1900, art. 3115 et seq.) To some extent the courts of Texas follow the California system, recognizing the common law of riparian rights. (See text, § 117.) There is nothing upon the subject in the State Constitution.

The appropriator is required to file a map and statement within ninety days after the commencement of the work of construction, containing about the same information as is required in Colorado. Upon compliance with the statute, the date of priority relates back to the time when the work of excavation or construction was commenced. (Sayles' Civ. Stats., arts. 3120, 3121.) A failure to file such statement does not, however, work a forfeiture of rights acquired theretofore, nor prevent the claimants of such rights from establishing them in the courts. (*Ibid.*, art. 3121.)

By an act of April, 1905, an act was passed for the formation of irrigation districts. (Sayles' Civ. Stats. 1906, p. 269.)

Statute of 1909, chapter 33, page 353, provides for an investigation of irrigation, by the commissioner of agriculture.

By a Statute of 1911, chapter 30, page 42, it is enacted that water users associations under Federal reclamation projects shall be exempt from State charter fees and franchise taxes.

The following discussion of the Texas water statutes was prepared by Hon. W. H. Wilson of Houston, Texas, and published in Bulletin 222, page 79, Office of Experiment Stations, United States Department of Agriculture:

"The most important statute in the State of Texas is found in chapter 2, title 60, of the Revised Statutes: Article 3115 declares the unappropriated waters of the ordinary flow or underflow of every flowing river or natural stream and the storm or rain waters of every river or natural stream, canyon, ravine, depression, or watershed within those portions of the State of Texas, *in which by reason of the insufficient rainfall or by reason of the irregularity of the rainfall irrigation is beneficial for agricultural purposes*, to be the property of the public and subject to appropriation for the uses and purposes named in the statute. By articles 3116 and 3118 it is provided that such waters may be appropriated for the purposes of irrigation, mining, milling, and construction of waterworks for cities and towns and stockraising in such sections of the State. By article 3117 it is provided that such waters shall not be diverted

for the purposes named 'to the prejudice of the rights of the riparian owner without his consent, except after condemnation thereof in the manner provided in the act.' By article 3119 it is provided that as between the appropriations, the first in time is first in right.

"By article 3120 it is provided that 'every person, corporation, or association of persons who have constructed or may hereafter construct any ditch, canal, reservoir, dam, or lake for the purposes named in this chapter, and taking the water from any natural stream, storage reservoir, dam, or lake, shall within ninety days after commencement of such construction, file and cause to be recorded in the office of the county clerk of the county where the headgate of such ditch or canal may be situated or to which said county may be attached for judicial purposes, in a well-bound book to be kept by said clerk for that purpose, a sworn statement in writing showing approximately the number of acres of land that will be irrigated, the name of such ditch or canal, the point at which the headgate thereof is situated, the size of the ditch or canal in width and depth, and the carrying capacity thereof in cubic feet per second of time, the name of said stream from which said water is taken, the time when the work was commenced, the name of the owner or owners thereof, together with a map showing the route of such ditch or canal; and when the water is to be taken from a reservoir, dam, or lake, the statement above provided for shall show in addition to the ditch and other things provided for, the locality of the proposed dam, reservoir, or lake, giving the names or numbers of the surveys upon which it is to be located, its holding capacity in cubic feet of water, the acreage and surface feet of land that will be covered, and the limits of such lake, reservoir, or dam, and the area of the watershed from which the storm or rain water will be collected.'

"Article 3121 provides that by compliance with the provisions of article 3120 the claimant's right to the use of the water relates back to the time when the work of excavation or construction commenced.

"Article 3122 provides that 'any person, firm, association of persons, or corporation may acquire the right to appropriate for irrigation purposes the unappropriated waters of the ordinary flow or underflow of every running or flowing river or natural stream, and the storm or rain water of every river or natural stream, canyon, ravine, depression, or watershed within those portions of the State referred to in article 3115, by filing a sworn statement in writing to be recorded as provided in article 3120, declaring his or its intention of appropriating such water. Said statement shall also show approximately the number of acres of land proposed to be irrigated, the name of such ditch or canal, the point at which the headgate thereof will be situated, the size of the ditch or canal in width and depth, and the carrying capacity thereof in cubic feet per second of time, the name of the person, firm, association, or corporation appropriating such water, the name of the stream, and shall attach to such statement a map showing approximately the proposed route of such ditch or canal; and when the water sought to be appropriated or acquired is storm or rain water, the statement above required shall show or describe also the locality of the proposed dam, reservoir, or lake by giving the names or numbers of the surveys upon which it is to be located, and approximately the following, that is to say, its holding capacity in cubic feet of water, the acreage of land that will be covered, and the area of the watershed from which the storm or rain waters will be collected; provided, any person, association of persons or corporation who has heretofore had a survey made of the proposed route of his or its ditch shall have a preference right at any time within ninety days from the time this chapter shall take effect to file the statement hereinbefore required for the appropriation of water. Within ninety days next after filing of said statement the party or corporation claiming the right to appropriate the water shall begin actual construction of the proposed ditch, canal, dam, lake, or reservoir, and shall prosecute the work thereon dili-

gently and continuously to completion.'

"Article 3123 provides that by 'completion' is meant the conducting of the water in the main canal to the place of intended use. Article 3124 provides that the person or corporation who has appropriated such waters in accordance with the statute shall be entitled to the exclusive use except that an owner whose land abuts on a running stream may use such water therefrom as may be necessary for domestic purposes, and except that a person owning land on the watershed from which the waters were collected may construct such dams, etc., as are necessary for the storage of water for *domestic* purposes. By article 3125 it is provided that—

" 'Corporations may be formed and chartered under the provisions of this chapter and of the general corporation laws of the State of Texas, for the purpose of constructing, maintaining, and operating canals, ditches, flumes, feeders, laterals, reservoirs, dams, lakes, and wells, and of conducting and transferring water to all persons entitled to the same for irrigation, mining, milling, to cities and towns for waterworks, and for stockraising, and for the purpose of building storage reservoirs for the collection and storage of water for the purposes before mentioned. All such corporations shall have full power and authority to make contracts for the sale of permanent water-rights, and to have the same secured by liens on the land or otherwise, and to lease, rent, or otherwise dispose of the water controlled by such corporation for such time as may be agreed upon, and in addition to the lien on the crops hereinafter provided for, the lease or rental contract may be secured by a lien on the land or otherwise. All persons who own or hold a possessory right or title to land adjoining or contiguous to any canal, ditch, flume, or lateral constructed and maintained under the provisions of this chapter, and who shall have secured a right to the use of water in said canal, ditch, flume, lateral, reservoir, dam, or lake, shall be entitled to be supplied from such canal, ditch, flume, lateral, dam, or lake, with water for irrigation of such land, and for mining, milling, and stockraising, in accordance with the terms of his or their contract; provided, that if the person, association, or corporation owning or controlling such water, and the person who owns or holds a possessory right or title to land adjoining or contiguous to any canal, ditch, flume, or lateral constructed and maintained under the provisions of this chapter, fail to agree upon a price for a permanent water-right, or for the use or rental of the necessary water to irrigate the land of such person and for mining, milling, and stockraising, such person, firm, association, or corporation shall, nevertheless, if such person, association, or corporation has or controls any water not contracted to others, furnish the necessary water to such person to irrigate his lands, and for mining, milling, and stockraising, at such prices as may be reasonable and just; provided, further, that in case of shortage of water from drought, accident, or other cause, the water to be distributed shall be divided among all consumers *pro rata* according to the amount he or they may be entitled to, to the end that all shall suffer alike, and preference be given to none. The sale of the permanent water-right shall be an easement to the land and pass with the title thereof, and the owner thereof shall be entitled to the use of the water upon the terms provided in his or their contract with such person or corporation, or in case no contract is entered into, then at just and reasonable prices. Any instrument of writing providing a permanent water-right shall be admitted to record in the same manner as other instruments relating to the conveyance of land.'

"Article 3126 grants to the corporations and associations named in the preceding article a right of way over public lands and grants right of condemnation of a right of way and land for reservoirs, etc., on and over the lands of private persons.

"Article 3128 provides a mode of crossing roads and highways with canals. By article 3130 it is provided that the person, corporation, etc., who leases or rents the water to any person or corporation owning

lands subject to irrigation 'shall have a preference lien superior to every other lien upon the crop or crops raised upon the lands thus irrigated under such lease or contract.'

"By article 3131 it is provided that a corporation organized for the purpose of irrigation shall have the right to acquire lands by donation or purchase, or in payment of stock or water-rights, and to hold and dispose of such land or other property and to borrow money for the construction and maintenance of its canals, reservoirs, etc., and may issue bonds and mortgage its corporate and other property and franchises to secure the payment of any debts contracted for same; provided that all lands acquired by said corporation, except such as are used for the construction, maintenance and operation of said canals, ditches, laterals, feeders, reservoirs, dams, lakes, and wells, shall be alienated within *fifteen years from the date of acquiring said lands, or be subject to judicial forfeiture.*

"By article 641 (section 23) of the Revised Statutes, private corporations may be formed for the construction, maintenance, and operation of dams, reservoirs, lakes, wells, canals, flumes, laterals, and other necessary appurtenances for the purpose of irrigation, navigation, milling, mining, stockraising, and city waterworks.

"There are other provisions of the statute law of Texas affecting irrigation, but they mainly concern details. The above are the more important statutes, and those under which the large irrigating corporations are organized and operating."

Texas Statutes Construed.—In the earlier parts of this book (Parts I to VII, inclusive) Texas Statutes are construed or cited upon the following pages:

Sayles' Civil Statutes.

Sayles' Civ. Stats., art. 312 1104
Sayles' Civ. Stats., art. 828, sec. 6 922
Sayles' Civ. Stats., art. 3115 194
Sayles' Civ. Stats., art. 3120 425
Sayles' Civ. Stats., art. 3121 425
Sayles' Civ. Stats., Supp. 1906, p. 269 1263

General Laws.

Gen. Laws 1889, p. 100, sec. 2 155
Act of March 10, 1875 258
Act of March 19, 1889 387

(3d ed.)

§ 1447. UTAH.

Declaration of public ownership.
Concerning riparian rights.
Ditches on private land—Eminent domain.
Preferences and pro-rating.
Administration.
Determination of existing priorities.
Method of appropriating.
Measurement of water.
Fees of State Engineer.
Irrigation districts.
Miscellaneous.
Utah statutes construed.

References are to the Constitution; Laws of 1905, chapter 108, as amended (1907, pages 56 and 248; 1909, chapter 62, and various chapters of the Laws of 1911), and to the Compiled Laws of 1907, section 126 et seq. The act of 1905 was substituted in 1905 for the Statute of 1903, chapter 100, but in most respects the two are identical. The law previously had (in Revised Statutes of 1898, sections 1261–1275) been modeled after the Civil Code of California. Rights initiated under the old law may still be completed under the old law (Stats. 1909, c. 62, p. 842). In Laws of 1911, chapter 104, page 145, section 14, there is a repeal of Compiled Laws of 1907, sections 1286 to 1288x4.

References to sections are to the statute of 1905, unless otherwise stated.

Constitution, article 17, section 1, provides: "All existing rights to the use of any of the waters in this State for any lawful or beneficial purpose are hereby recognized and confirmed."

Text, §§ 6, 170.

Declaration of Public Ownership.—"The water of all streams and other sources in this State, whether flowing above or under ground, in known or defined channels, is hereby declared to be the property of the public, subject to all existing rights to the use thereof." (Sec. 47. See, also, Comp. Laws 1907, sec. 1288x18.)

Text, § 118.

Concerning Riparian Rights.—"Rights to the use of any of the unappropriated water in the State may be acquired by appro-

[Concerning Riparian Rights]

priation, in the manner herein provided, and not otherwise" (sec. 34). The courts follow the Colorado system, rejecting riparian rights *in toto*. "Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this State." (Sec. 49. See, also, Comp. Laws 1907, sec. 1288x20.)

Text, cc. 10, 26, 37.

Ditches on Private Land—Eminent Domain.—See Compiled Laws of 1907, sections 1288x21 and 1288x22, for building or enlarging ditches on another's private land.

Text, § 308.

Preferences and Pro-rating.—The prior appropriator shall always be supplied in full before a subsequent appropriator gets any water, except in the annual low-water stage, when all users are on an equal footing, and pro-rate. In time of scarcity, domestic uses have preference over all other purposes, and agriculture is preferred over all except domestic use; those using for the same purpose maintaining priorities between themselves (sec. 56. See, also, Comp. Laws 1907, sec. 1288x27).

Text, c. 49.

Administration.—The use of water for beneficial purposes is a public use. The State Engineer, appointed for four years by the governor, has general supervision of the waters of the State, their measurement, apportionment, appropriation, making rules and regulations, and publishing biennial reports, including recommendations upon changes in the law, etc. (Comp. Laws 1907, sec. 1261 et seq.; and sec. 1286 et seq.)

In Laws of 1911, chapter 104, page 145, new provisions are added and some old ones are repealed. It is there provided that the State Engineer shall divide the State into water districts only when necessity arises (sec. 1), with one "water commissioner" for each, appointed by the governor (sec. 2). The water commissioner shall execute decrees of court and regulate water by priorities (including users under partnership ditches, sec. 4), subject to appeal to the State Engineer, and from him to court (sec. 5). The water commissioner is to be paid by the county (sec. 6), and not to begin work until called upon by some appropriator, or by the State Engineer (sec. 8). The water commissioner may make arrests (sec. 9). He may order a flume substituted for a

[Administration]

ditch (sec. 10), and may enforce orders by refusing water or by emptying reservoirs (sec. 10). He may, at request, also take charge of the works of co-owners (sec. 12).

The Conservation Commission is to inquire into the most beneficial purpose to which streams can be put, and into the feasibility of power projects (Laws 1911, c. 137, p. 270).

Text, c. 51.

Determination of Existing Priorities.—The State Engineer must make a complete survey of each river system or water source in the State beginning with those most used for irrigation, and collect all data that will aid in adjusting existing priorities (sec. 6. See, also, Comp. Laws 1907, sec. 1271 et seq.). He must publish a notice in a newspaper for fifteen days before commencing on any system. On completion of his survey, he files a written statement with the clerk of the district court of the county in which the stream is situated, and if situated in more than one county, then in the most convenient one, whereupon said district court shall have exclusive jurisdiction to determine all water-rights on said river or water source (sec. 11). Within thirty days after the filing of this statement the clerk of the court publishes notice once a week for three successive months, requiring all claimants to file claims within six months. The clerk also mails a copy of this notice to each claimant, inclosing a form for statement of claim. This is filled out and verified by the oath of claimant. The State Engineer must tabulate these claims, and file this tabulation with the clerk of the district court and with the county recorder of each county in which the water is situated (sec. 13). Failure to file claim within the six months is a complete bar, unless the claimant did not receive actual notice, in which case the court may extend the time to one year, the court publishing notice of the request for extension (sec. 14).

At the end of the six months the court may appoint a referee, or may determine priorities without a referee (secs. 15, 17. If the judge or referee is an interested party, see Stats. 1911, c. 3, p. 2). The statements filed by claimants stand in the place of pleadings, and the State Engineer furnishes the referee or court with the data he has collected (sec. 17). Testimony may be taken at such places as advisable, giving notice to claimants as each claim comes up (sec. 18). Any interested party may file a contest (sec. 19).

[Determination of Existing Priorities]

The decree is rendered by the court upon the findings of the referee, if satisfactory to the court, subject to appeal to the supreme court, if taken within six months (secs. 21, 22, 23). This decree sets forth "the name and postoffice address of the person, corporation or association entitled to the use of the water; the quantity of water in acre-feet, or the flow of water in second-feet to be used; the purpose for which the water is to be used each year; the name of the stream or other source from which the water is diverted; the priority number of the right; the date of the right, and such other matters as will fully and completely define the right of said person, corporation or association to the use of the water" (sec. 22).

A certificate is then issued in duplicate to each owner containing the facts stated in the decree. One copy is to be recorded within thirty days with the county recorder of the county where the division is made, and the other is to be filed with the State Engineer (sec. 24). Costs are a lien upon the land and water of the parties, to be collected like taxes (Laws 1911, c. 3, p. 2, amdg. Comp. Laws 1907, sec. 1285).

Text, c. 18.

Method of Appropriating.—Before commencing or enlarging any work, written application must be made to the State Engineer on a form furnished by him, setting forth the name and postoffice address of applicant, the purpose of use, quantity to be used, time of use, name of stream, point of diversion, nature and description of diverting works in detail, and such other facts as will clearly define the full purpose of the proposed appropriation (Comp. Laws 1907, sec. 1288x5 et seq.; amd. 1909, c. 62, p. 84). If for irrigating, it must also show and describe what land is to be irrigated. If for power, the nature and description of the proposed equipment, and the place where the water is to be returned to the natural stream. If for mining, the name and kind of mine and the place where the water is to be returned *(Ibid.)*. Storage in a reservoir shall be regarded as a diversion, and the points of diversion include the point where water is taken from the stream, and the point at center of the dam. (Comp. Laws 1907, sec. 1288x6, amd. 1909, c. 62, p. 84.)

The date of receipt of the application is indorsed thereon by the State Engineer, who may require the application to be cor-

[Method of Appropriating]

rected (sec. 36), the applicant having sixty days for refiling and approval or rejection (Stats. 1907, p. 248). The State Engineer publishes notice of the application in a newspaper within the boundaries of the river system or water source where the appropriation is to be made for thirty (30) days. Protests may, within thirty days after final publication, be filed with him (secs. 37, 38). He may require additional information, such as particulars concerning the corporation, if the applicant is a corporation (sec. 41).

Under the Act of 1911, chapter 103, page 143 (amdg. Comp. Laws 1907, secs. 1288x5 and 1288x10, and Laws 1909, c. 62), the State Engineer must approve all applications except where they will conflict with existing rights, or where, after submission of the question to court, the court decides that the application is not for the most beneficial use of the water; and by Laws of 1911, chapter 137, page 270, the Conservation Commission is to gather data upon what is the most beneficial use for the various streams, and upon the feasibility of specific projects. Approval or disapproval is indorsed by the State Engineer upon the application. Permits may be assigned, and the assignment may be recorded in the office of the State Engineer (Laws 1909, c. 62, p. 84, amdg. Comp. Laws 1907, sec. 1288x17).

Under the Act of 1911, chapter 3, page 2 (amdg. Comp. Laws 1907, sec. 1288x14. See, also, Laws 1909, c. 62, p. 84), work must begin within six months after approval of the application, and be prosecuted with diligence, and completed within a time (not over five years) to be specified by the State Engineer, one-fifth (1/5) of the work to be done in one-half (1/2) the time allowed. Irrigation works are to be put to actual use within a time likewise so fixed, not exceeding four years after completion of the works. For failure of the appropriator to be on time, the State Engineer may declare a forfeiture after sixty days' notice and an opportunity to be heard. Prevention by operation of law shall be an excuse for the delay, and in any event the State Engineer may extend the time, provided the sum of the extensions does not exceed fourteen (14) years from the approval of the original application. Within sixty days from the State Engineer's decision, appeal may be taken to court.

Upon completion of work a sworn description and proof of work must be filed with the State Engineer on a form furnished

[Method of Appropriating]

by him, attested by two witnesses, and accompanied by complete detailed maps, also certified, a failure to make such proof being a misdemeanor (sec. 44).

A numbered certificate of appropriation in duplicate is issued to the appropriator by the State Engineer when he is satisfied that the appropriation has been effected. This certificate sets forth the name and address of the appropriator, the amount of water, purpose for which used, time of use, name of stream, place of diversion, priority number, date of appropriation, and such other matters as will fully define the right. One copy is to be filed with the State Engineer. The other copy is recorded by the appropriator with the recorder of the county where the water is diverted, and is his evidence of his right (sec. 45).

A change in place of diversion or use may be made only on making a report to the State Engineer (sec. 53. See, also, Comp. Laws 1907, secs. 1288x8, and 1288x24, amd. 1909, c. 62, p. 84).

"The priority number of such appropriation shall be determined by the date of receiving the written application in the State Engineer's office" (sec. 46).

Reservoirs.—A special provision covers the building of dams (in sections 3 to 10). Duplicate plans, etc., for any dam over five feet in height across the natural channel of a running stream, or any other dam over ten feet, shall be submitted to the State Engineer for his approval; one copy to be returned with his approval or disapproval. Failure of persons to comply with this requirement is a misdemeanor. The work must be done under the supervision of the State Engineer.

Text, §§ 486, 487.

Measurement of Water.—The standard unit of flow is one cubic foot per second; of volume, one acre-foot, equivalent to 43,560 cubic feet (Stats. 1905, p. 160, sec. 48; Comp. Laws 1907, sec. 1288x19).

Fees of State Engineer.—(Utah Laws 1911, c. 2, p. 2, amending Comp. Laws 1907, sec. 970x.)

"The State Engineer shall collect the following fees, which shall be paid by him into the State treasury on the first Monday in January, April, July and October of each year.

"For examining and approving plans and specifications for any dam, one dollar for each and every foot in height of the dam to be built; and, if necessary to inspect the site

[Fees of State Engineer]

where the dam is to be built, an additional charge of ten dollars per day and expenses shall be made.

"For inspecting any diverting works, by request, ten dollars per day and expenses.

"For examining and filing applications to apropriate any quantity of water up to and including ten cubic feet per second, for each such application two and one-half dollars.

"Applications for water that specify quantities greater than ten cubic feet per second, a fee of one dollar for each cubic foot above the ten cubic feet hereinbefore mentioned.

"For applications which contemplate the storage of water, a minimum fee of two and one-half dollars for each such application.

"Applications for water that specify quantities greater than five hundred acre-feet, a fee of two cents for each acre-foot of water to be stored, in excess of five hundred acre-feet.

"Provided, however, that when the filing fee for any application for water shall exceed $1,000, the balance of the fee in excess of $1,000, may, at the option of the applicant, be paid at the time when proof of the completion of the works is submitted.

"For examining map, profile and drawings that are part of the proof of appropriation, five dollars.

"For approving and recording completed applications, two and one-half dollars.

"For issuing certificates of appropriation, each, one dollar.

"For examining and filing notices of protest, each, two and one-half dollars.

"For filing any other paper, one dollar.

"Affidavits, decrees, and other instruments attached to a protest shall be considered other papers within the meaning of this section, and for each such, a fee of one dollar shall be charged.

"For certified copy of any paper, per folio, twenty cents.

"For blue-print copy of any map, profile or drawing, per square foot, ten cents.

"For each certificate to copy of paper, drawing or map, fifty cents; provided, that the provisions of section 970x shall not apply to works prosecuted under the supervision of the United States Reclamation Service.

"Sec. 2. This act shall take effect upon approval.

"Approved January 31, 1911."

Text, c. 58.

Irrigation Districts.—Concerning irrigation districts based on the Wright Act of California, see Statutes of 1888, page 127; Revised Statutes of 1898, section 1287 et seq. (since repealed), and Statutes of 1905, chapter 108, section 71. The system is reenacted in Laws of 1909, page 144, chapter 74; Laws of 1911, chapter 53, page 70.

Miscellaneous.—Regarding stored water carried in streams. see Laws of 1911, chapter 43, page 60 (amending Comp. Laws 1907, sec. 1288x25).

Beneficial use measures appropriations irrespective of carrying capacity of ditch (Laws 1911, c. 104, p. 145, sec. 13). Seven years of nonuse cause loss of right (Comp. Laws 1907, sec. 1288x23; Stats. 1905, p. 160). Water-rights pass as an appurtenance upon a sale of the land where used, unless expressly reserved (Comp. Laws 1907, sec. 1288x32).

[Miscellaneous]

Concerning eminent domain, see Constitution, article 1, section 22, and Compiled Laws of 1907, section 1288x21 et seq. For well-boring experiments, the Statute of 1907, page 21 (see, also, Laws of 1911, chapter 65, page 89), requires the landowner to deed an acre of land and rights in water to the State officials (after condemnation?). Concerning water-rights of cities, see Constitution, article 11, section 6; and see Compiled Laws of 1907, section 302x13, as amended by Laws of 1911, chapter 123, page 221. In article 13, section 3, of the constitution, irrigation works are exempt from taxation.

Concerning appropriation by the United States Reclamation Service, see Compiled Laws of 1907, section 1288x13, amended in Statutes of 1909, chapter 62, page 84. Regarding the Carey Act, see, *inter alia*, Laws of 1911, chapter 102, page 141. Regarding State reservoirs, see Laws of 1911, chapter 60, page 82.

Utah Statutes Construed.—In the earlier parts of this book (Parts I to VII, inclusive) Utah Statutes are construed or cited upon the following pages:

Constitution.

Art. 1, sec. 22 649
Art. 13, sec. 3 301

Revised Statutes.

Rev. Stats. 1898, secs. 1261–1275 387
Rev. Stats. 1898, sec. 1278 653
Rev. Stats. 1898, sec. 1287 1263
Rev. Stats. 1898, sec. 3521 ..... 74, 696

Session Laws.

Stats. 1888, p. 127 1263
Stats. 1901, c. 100, sec. 53 1100
Stats. 1903, c. 100 150
Stats. 1905, c. 108 ..... 150, 324, 440, 587, 653
Stats. 1905, c. 108, secs. 1–3 1097
Stats. 1905, c. 108, sec. 26 1099
Stats. 1905, c. 108, secs. 26–30 1098
Stats. 1905, c. 108, sec. 34 153
Stats. 1905, c. 108, sec. 46 453
Stats. 1905, c. 108, sec. 47 191

Session Laws—Continued.

Stats. 1905, c. 108, sec. 48 521
Stats. 1905, c. 108, sec. 50 ..... 657, 1097, 1166
Stats. 1905, c. 108, sec. 53 ..... 551, 619
Stats. 1905, c. 108, sec. 60 296
Stats. 1905, c. 108, sec. 62 580
Stats. 1905, c. 108, sec. 63 ..... 296, 580
Stats. 1905, c. 108, sec. 64 1100
Stats. 1905, c. 108, sec. 71 1263
Stats. 1905, c. 115, p. 177, sec. 2 ..... 1309, 1319
Stats. 1907, p. 56 194
Stats. 1907, p. 57, sec. 55 733
Stats. 1907, p. 57, sec. 64 733
Stats. 1907, p. 248 194
Stats. 1907, c. 156, sec. 36 443
Stats. 1909, c. 62, p. 84 ..... 296, 297, 444, 445, 448, 452, 543, 547, 551, 1276
Stats. 1909, c. 62, p. 84, sec. 2 438
Stats. 1909, c. 74, p. 144 1263
Stats. 1911, c. 3, p. 2 ..... 441, 452, 1121, 1133
Stats. 1911, c. 43, p. 60 38
Stats. 1911, c. 53, p. 70 1263
Stats. 1911, c. 65, p. 89 1037
Stats. 1911, c. 102, p. 141 1266
Stats. 1911, c. 103 446
Stats. 1911, c. 103, p. 143 ..... 444, 452
Stats. 1911, c. 104, p. 145 ..... 1098, 1099
Stats. 1911, c. 104, p. 145, sec. 8 1111
Stats. 1911, c. 104, p. 145, sec. 9 1100
Stats. 1911, c. 104, p. 145, sec. 10 ..... 542, 1100
Stats. 1911, c. 104, p. 145, sec. 12 345
Stats. 1911, c. 104, p. 145, sec. 13 ..... 503, 506
Stats. 1911, c. 137 446

Compiled Laws.

Comp. Laws 1888, secs. 2775–2789 329
Comp. Laws 1888, sec. 2780 251
Comp. Laws 1907, sec. 1285 ..... 1121, 1133
Comp. Laws 1907, sec. 1288x5 444
Comp. Laws 1907, sec. 1288x6 543
Comp. Laws 1907, sec. 1288x8 ..... 296, 551
Comp. Laws 1907, sec. 1288x10 ..... 444, 445
Comp. Laws 1907, sec. 1288x13 1276
Comp. Laws 1907, sec. 1288x14 ..... 445, 452
Comp. Laws 1907, sec. 1288x17 448
Comp. Laws 1907, sec. 1288x20 504

Compiled Laws—Continued.

Comp. Laws 1907, sec. 1288x22 653
Comp. Laws 1907, sec. 1288x23 619
Comp. Laws 1907, sec. 1288x24 .....296, 551
Comp. Laws 1907, sec. 1288x25 38
Comp. Laws 1907, sec. 1288x27 1184
Comp. Laws 1907, sec. 1288x32 592

(3d ed.)

§ 1448. WASHINGTON.

Eminent domain.
Riparian rights.
Supervision of appropriators.
Adjustment of existing priorities.
Method of appropriating.
Public service—Water companies and consumers.
Irrigation districts.
Irrigation on State lands.
Miscellaneous.
Washington statutes construed.

References are to Pierce's Code, 1905 edition, unless otherwise stated (see, also, Ballinger's Code of 1897, sec. 4092 et seq., and Session Laws of 1907, 1909, 1911). An attempt in 1911 to adopt the Wyoming administrative system failed, as it has upon previous occasions. The Constitution, article 21, section 1, contains a provision based on California Constitution, article 14, section 1, that the use of water is a public use.

General Provisions.—Appropriation is allowed. "Use of water at all times" is declared a public use (sec. 5122). Appropriation of waters of lake, pond, flowing spring, river, stream, or ravine, is mentioned (sec. 5131). Ditches for using waste, seepage, or spring water shall be covered by same laws as streams, but the person on whose land the seepage rises shall have a prior right thereto (sec. 5829. See, also, Ball. Ann. Codes, sec. 4114. See Nielson v. Sponer, 46 Wash. 14, 123 Am. St. Rep. 910, 89 Pac. 155, and Hollett v. Davis, 54 Wash. 326, 103 Pac. 423). Natural irrigation from natural overflow or seepage gives a right which may be converted into a diversion if necessary (sec. 5830). Beneficial use limits irrigation (sec. 5836). Purpose of use may be changed (sec. 5139). "The right to the use of water may be transferred like other property by deed" (sec. 5136).

Text, cc. 26, 37.

Eminent Domain.—A procedure is provided for condemnation of riparian rights in section 5858. Condemnation for rights of way is provided in section 5848. The condemner must file a map, etc. (sec. 5856). The act applies only to irrigation (sec. 5857). Condemnation by a water company is provided in section 7081.

[Eminent Domain]

The right of condemnation by water companies shall not extend to water already actually used for irrigation (secs. 5869, 5871). Section 4156, Ballinger's Annotated Codes and Statutes, is as follows: "The right herein given to condemn the use of water shall not extend any further than to the riparian rights of persons to the natural flow of water through lands upon or abutting said streams or lakes, as the same exists at common law, and is not intended in any manner to allow water to be taken from any person that is used by said person himself for irrigation, or that is needed for that purpose by any such person." See text, *supra*, § 864.

Text, §§ 117, 119.

Riparian Rights.—"All persons who claim, own, or hold possessory right or title to any land, or parcel of land, or mining claim within the boundaries of the State of Washington, when such lands, mining claims, or any part of the same are on the banks of any natural stream of water, shall be entitled to the use of any water of said stream not otherwise appropriated for the purposes of mining and irrigation to the full extent of the soil for agricultural purposes" (sec. 5123). Nonriparian owners shall have a right of way over riparian lands by taking condemnation proceedings provided for in section 5127, paying compensation in court (secs. 5124–5128. See, also, sec. 5815 et seq.). Nonriparian owners may take surplus water (sec. 5821).

The legislation of Washington has not been hostile to the common law. In Benton v. Johncox, 17 Wash. 277, 61 Am. St. Rep. 912, 49 Pac. 498, 39 L. R. A. 107, the court says (the statutes mentioned being evidently those just above given): "Nor did the legislature disregard the rights of riparian owners in the general act of 1890 relating to appropriation of water for irrigation. (1 Hill's Code, sec. 1718 et seq.) On the contrary, sections 1761 and 1774 of that act especially recognize the existence of riparian rights, and we do not see anything in that statute or the subsequent act of 1891 evincing an intention on the part of the legislature to disregard such rights."

The court upholds the riparian rights of private land.

Text, c. 49.

Supervision of Appropriators.—Each county is a water district with a water commissioner for each (sec. 5840). The commissioners shall apportion the water, control headgates, etc. (sec. 5842). Water commissioners shall keep a register of appropriations (sec. 5847). A very loose section (sec. 5826) provides for

[Supervision of Appropriators]

water commissioners to be appointed by court to supervise the acts of irrigators, in use of water. A statute of 1907, chapter 222, page 285, concerns use of a stream to carry stored water, or as a conduit for other waters. It provides that application must be made to the superior court, who appoints a commissioner to measure and supervise the inlet and outlet of the water to and from the stream. Appropriators along the stream must maintain headgates, etc., and interference therewith is a misdemeanor.

It is the duty of owners to maintain headgates (secs. 5837, 5901). There is a penalty for tampering with ditches (sec. 5834). Injury to water appliances is a misdemeanor (Stats. 1909, c. 209, p. 721, sec. 5872). Tampering with irrigation appliances is a misdemeanor, and (sec. 1908) the presumption is that the user of the water tampered with is guilty (sec. 1907). Duties of ditch-owners to prevent overflow are specified (sec. 5834). Section 5835 concerns pipes, etc., on public highways, and the bridging of public roads (see Stats. 1907, p. 600).

Text, c. 51.

Adjustment of Existing Priorities.—Adjudication of rights is provided in section 5873 et seq. Owners are required to file a claim with the clerk of the superior court before June 1, 1890. A decree of court is to adjudge the right, and the court is to issue a certificate by the clerk, which (sec. 5875) the holder shall record like a deed. Priorities are to be mentioned on issuing the certificates (sec. 5879). Where there is a deficiency of supply, the judge may appoint commissioners to make an equitable *apportionment.* The apportionment may be made by enforcing a *pro rata* reduction from the full amount appropriated (secs. 5820–5824, 5831).

Text, c. 17.

Method of Appropriating.—"Any person, persons, corporation, or association desiring to appropriate water must post a notice in writing in a conspicuous place at the point of intended storage or diversion, stating therein:

"First. That such appropriator claims the water there lying, being, or flowing, to the extent of one cubic foot of water per second of time, or some multiple or some fractional portion thereof.

[Method of Appropriating]

"Second. The purpose for which said water is appropriated, and the place or places, as near as may be, of intended use.

"Third. The means by which it is intended to store or divert the same.

"Fourth. A copy of the notice must, within ten (10) days after it is posted, be filed for record in the office of the county auditor of the county in which it is posted" (sec. 5132).

Appropriations may be made for any beneficial purpose (Thompson v. Pennebaker, 173 Fed. 849). But the above quotation seems to apply only to irrigation (sec. 5138). If the purpose of use is storage, work must be commenced within three months after posting notice; if the purpose is to be accomplished by diversion, six months. It must be diligently prosecuted (sec. 5133). The right relates back to the posting of notice (sec. 5134). Appropriations for mining and manufacture are recognized (secs. 5140, 5141).

Text, Part VII.

Public Service.—A statute in 1911 created a general public service commission (Stats. 1911, c. 117), having jurisdiction over water distribution. The Constitution declares the use of water a public use, subject to the regulation of the State (Const., art. 21, sec. 1, based upon the California Constitution).

Text, c. 58.

Irrigation Districts.—Irrigation districts based on the Wright Act of California are provided in Pierce's Codes of 1905, section 5736 et seq.; Ballinger's Code of 1897, sections 4166–4249; amended in Statutes of 1911, chapter 97 (concerning their dissolution, secs. 5881, 5886). The irrigation district law was upheld in Board of Directors v. Peterson, 4 Wash. 147, 29 Pac. 795; Kinkade v. Witherop, 29 Wash. 10, 69 Pac. 399 and other cases.

Irrigation on State Lands.—See Pierce's Code of 1905, section 5904. In the Statutes of 1907, page 353, the right of way for irrigators over State lands is granted, upon filing map and field-notes with the Board of State Land Commissioners, and paying not less than $10 per acre for the land irrigated. "Nothing in this act shall be deemed to in any way conflict with any existing law of this State relating to the method of acquiring rights of way for irrigation districts." In the Statutes of 1907, page 233, the

right is granted to overflow State lands for reservoirs (see, also, Stats. 1911, c. 109, regarding rights of way over State lands).

Miscellaneous.—A water company "shall be deemed to be a public carrier" (sec. 5870). The unit of measurement shall be a cubic foot of water per second of time (sec. 5942). Appropriations by United States are provided for (sec. 5903; also, Stats. 1905, p. 180). Water users associations are provided for in section 5903 F. Concerning pollution of water supply, see Statutes of 1907, page 562. Concerning municipal waterworks, see Statutes of 1911, chapter 111. Concerning dams in navigable rivers, see Statutes of 1911, chapter 95. Concerning waterway districts, see Statutes of 1911, chapters 10, 11, and 23. Concerning drainage districts, see Statutes of 1911, chapter 97.

Washington Statutes Construed.—In the earlier parts of this book (Parts I to VII, inclusive) Washington Statutes are construed or cited upon the following pages:

Constitution.

Art. 1, sec. 16 657
Art. 21, sec. 1 ..... 657, 1162, 1166

Ballinger's Code, 1897.

Bal. Code, sec. 4092 388
Bal. Code, sec. 4156 920
Bal. Code, sec. 4166 1263

Hill's Code.

Hill's Code, secs. 1718, 1761, 1774 144

Pierce's Code, 1905.

Pierce's Code, sec. 1908 733
Pierce's Code, sec. 5122 ..... 657, 1166
Pierce's Code, sec. 5123 144
Pierce's Code, sec. 5124 249
Pierce's Code, sec. 5127 921
Pierce's Code, sec. 5132 ..... 388, 401
Pierce's Code, sec. 5133 413
Pierce's Code, sec. 5134 425
Pierce's Code, sec. 5136 572
Pierce's Code, sec. 5139 530
Pierce's Code, sec. 5736 1263

Pierce's Code—Continued.

Pierce's Code, sec. 5821 878
Pierce's Code, secs. 5820–5824 329
Pierce's Code, sec. 5826 1113
Pierce's Code, sec. 5829 50
Pierce's Code, sec. 5830 397
Pierce's Code, sec. 5831 329
Pierce's Code, sec. 5834 733
Pierce's Code, sec. 5836 503
Pierce's Code, sec. 5837 733
Pierce's Code, secs. 5840–5847 1113
Pierce's Code, sec. 5848 921
Pierce's Code, sec. 5869 920
Pierce's Code, sec. 5870 ..... 1162, 1166
Pierce's Code, sec. 5871 920
Pierce's Code, sec. 5872 733
Pierce's Code, sec. 5881 1263
Pierce's Code, sec. 5901 733
Pierce's Code, sec. 5903 ..... 1276, 1309
Pierce's Code, sec. 5904 233
Pierce's Code, sec. 8942 521

Session Laws.

Stats. 1873, p. 520 144
Stats. 1899, c. 131, p. 261 ..... 144, 657
Stats. 1905, c. 88, sec. 3, p. 180 ..... 1276, 1309, 1319
Stats. 1905, c. 88, sec. 6, p. 183 1319
Stats. 1905, c. 88, sec. 7, p. 184 1319
Stats. 1907, p. 233 233
Stats. 1907, c. 222, p. 285 ..... 39, 733
Stats. 1907, c. ——, p. 353 233
Stats. 1909, c. 209, p. 221 1113
Stats. 1911, c. 11, sec. 7, subd. d 944
Stats. 1911, c. 95 937
Stats. 1911, c. 97 ..... 379, 1263
Stats. 1911, c. 109 233
Stats. 1911, c. 117 ..... 1186, 1197, 1207
Stats. 1911, c. 117, sec. 26 ..... 1186, 1190, 1191
Stats. 1911, c. 117, sec. 34 1223

(3d ed.)

§ 1449. WYOMING.

Declaration of State ownership.
Appropriation.
Concerning riparian rights.
Ditches on private land—Eminent domain.
Preferences.
Administration.
Determination of existing priorities.
Method of appropriating.
Fees of State Engineer.
Duty and measurement of water.
Public service—Water companies and consumers.
Irrigation districts.
Carey Act.
Miscellaneous.
Wyoming statutes construed.

References are to the Constitution, articles 1, 8 and 13, and the Statutes of 1907, page 138, codifying the Revised Statutes of 1899, and succeeding session laws. (See, also, Comp. Laws 1910, sec. 724 et seq.) There were no changes in 1911. The Wyoming Constitution and statutes beginning with the year 1891 have been the model for many of the provisions of the water codes now existing in most of the arid States, especially those features dealing with the State Engineer, the board of control, and the method of appropriating by issuance of permits. Prior to 1907, the Wyoming irrigation law did not exist in a single code. Many of the important features were placed in the Constitution itself.

Text, §§ 6, 170.

Declaration of State Ownership.—"The waters of all natural streams, springs, lakes or other collections of still water, within the boundaries of the State, are hereby declared to be the property of the State." (Const., art. 8, sec. 1. See, also, Stats. 1909, p. 112.) The legislature of 1911 petitioned Congress to grant all natural resources to the States wherein they lie (Wyo. Laws 1911, p. 200).

Text, § 108.

Appropriation.—Constitution, article 8, section 3: "Priority of appropriation for beneficial uses shall give the better right.

[Appropriation]

No appropriation shall be denied except when such denial is demanded by the public interests."

Text, § 118.

Concerning Riparian Rights.—The courts follow the Colorado system, rejecting riparian rights *in toto*.

The Colorado statute that all landowners on banks of a stream have a right to the use of the water for irrigation appears in Compiled Laws of 1876, chapter 65, section 1, Revised Statutes, 1317,

> In the Compiled Laws of 1876, it was provided as follows: "All persons who claim, own, or hold a possessory right, or title, to any land or parcel of land, within the boundary of Wyoming territory, when those claims are on the bank, margin, or neighborhood of any stream of water, creek, or river, shall be entitled to the use of the water of said stream, creek, or river, for the purposes of irrigation, and making said claim available, to the full extent of the soil, for agricultural purposes."

If inconsistent with the law of appropriation (held not so), then it is probably repealed by codification of 1907. (See text, § 119). That it is repealed is the accepted law in Wyoming.

Text, c. 10.

Ditches on Private Land—Eminent Domain.—Wyoming Laws of 1907, chapter 52, as amended by Laws of 1909, chapter 96 (see, also, Rev. Stats. 3874): The statute provides for obtaining rights of way over private land for ditches, reservoir sites, etc., by condemnation. It starts out (sec. 1) by saying that every person requiring a way of necessity across the lands of others is authorized to enter thereon for examination, survey, etc., and "to take, hold and appropriate so much real property as may be necessary," etc., or to enlarge another's ditch, reservoir, etc., to hold additional water, and "to take and appropriate material for the construction and repair," etc., the right of way not to exceed 100 feet on each side of the margin of actual ditch, etc., "unless a greater width is necessary." So far it follows the idea of a free right of necessity without compensation. But then follow stringent provisions for a hearing in court and compensation before the appropriation of the land can be made or possession taken. Ten days' notice must be given (sec. 4), and a petition filed in the district court (sec. 2). The court may appoint commissioners (sec. 6). Possession may not be taken until the entry of an order by the court, and either the assessed compensation actually paid or a suitable bond given, and in fixing compensation, due compensation must be in-

cluded for any advantage the previous ditch, etc., may be to its owner.

Text, § 308.

Preferences.—Laws of 1909, chapter 68, section 2 (Comp. Laws 1910, sec. 725): "Water-rights are hereby defined as follows according to use. Preferred uses shall include rights for domestic and transportation purposes; existing rights not preferred, may be condemned to supply water for such preferred uses in accordance with the provisions of the law relating to condemnation of property for public and semi-public purposes. Such domestic and transportation purposes shall include the following: 1st. Water for drinking purposes for both man and beast. 2d. Water for municipal purposes. 3d. Water for the use of steam engines and for general railway use. 4th. Water for culinary, laundry, bathing, refrigerating (including the manufacture of ice), and for steam and hot water heating plants. The use of water for irrigation shall be superior and preferred to any use where turbine or impulse water wheels are installed for power purposes." Section 3: "Where it can be shown to the board of control under the provisions hereof, that a preferred use is to be made, the procedure for a change of such use shall embrace a public notice, an inspection and hearing, if necessary, by and before the proper division superintendent, a report by such superintendent to the board of control and an order by said board. If the change of use is approved, just compensation shall be paid and under the direction of the board, proper instruments shall be drawn and recorded."

Text, c. 49.

Administration.—(See Comp. Laws 1910, sec. 753 et seq.). Constitution, article 1, section 31: "Water being essential to industrial prosperity, of limited amount and easy of diversion from its natural channels, its control must be in the State, which, in providing for its use, shall equally guard all the various interests involved."

Article 8, section 1 (quoted above).

Article 8, section 2: "There shall be constituted a board of control to be composed of the State Engineer and superintendents of the water divisions, which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the

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State, and of their appropriation, distribution and diversion, and of the various officers connected therewith, its decisions to be subject to review by the courts of the State."

Article 8, section 3 (quoted above).

Article 8, section 4: "The legislature shall by law divide the State into four water divisions and provide for the appointment of superintendents thereof."

Article 8, section 5: "There shall be a State Engineer, who shall be appointed by the governor of the State and confirmed by the Senate; he shall hold his office for the term of six years, or until his successor shall have been appointed and shall have qualified; he shall be president of the board of control and shall have general supervision of the waters of the State, and of the officers connected with its distribution. No person shall be appointed to this position who has not such theoretical knowledge and such practical experience and skill as shall fit him for the position."

General control lies in a board of control ordained by the Constitution, consisting of the State Engineer and the superintendents of the water divisions, and shall have control over all waters (Const., art. 8, sec. 2; Rev. Stats. 857), and must meet twice a year (Stats. 1907, p. 138, sec. 5). The State Engineer shall be president of the board (Const., art. 8, sec. 5). He has general powers over the whole State *(Ibid.)*, and may inspect any work (Rev. Stats. 932 et seq.). Appeals may be taken from the State Engineer to court (Laws 1909, p. 106). The constitution establishes four water divisions, with one superintendent for each (Const., art. 8, sec. 4; Rev. Stats. 848), who controls waters within his divisions, and performs whatever duties the State Engineer may assign (Rev. Stats. 849, 850), and may make regulations for his division (Rev. Stats. 851). Regarding the powers and duties of division superintendents, see, also, Laws of 1909, page 103.

Revised Stats., section 851, amended by Laws of 1909, chapter 61, provide: "Said division superintendent shall have authority to order in writing, the construction of suitable ditches to carry the return waters from any ditch or lands, to the main stream or proper wasteway: he shall have the authority and it shall be his duty to close, or cause to be closed, the headgate of any person, persons or corporation so ordered, until such time as said order is complied with; he shall, in the distribution of water, be governed by the provisions of this title, but for the better discharge of his duties, he shall have authority to make such other regulations to secure the equal and fair distribution of water in accordance with the rights of priority of appropriation as may, in his judgment, be needed in his division; provided, such regulations shall not be in violation of the laws

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of the State, but shall be merely supplementary to and necessary to enforce the provisions of the general laws and amendments thereto." (Rev. Stats., sec. 851, as amended by Sess. Laws 1909, c. 61. See, also, Rev. Stats., sec. 930, providing *inter alia:* "When it may be necessary for the protection of other water users, the division superintendent has authority to require flumes to be installed along the line of any ditch.")

Each division may, as necessity arises, be divided into water districts by the State board of control (Rev. Stats., sec. 888), with one water commissioner for each district (Rev. Stats. 889), who has direct control over the administration of water within his district (Rev. Stats. 890 et seq.; Stats. 1907, p. 138, sec. 7 et seq.), subject to appeal to the division superintendent and from him to the State Engineer and then to court (Stats. 1901, p. 107). He divides the water according to the decree of the board of control, may shut down headgates, regulate partnership ditches according to decrees, etc., on demand of users or of division superintendent (Stats. 1907, p. 138, sec. 7 et seq.).

Laws of 1907, chapter 86, provide: "It shall be the duty of the said water commissioners to divide the water of the natural stream or streams of his district among the several ditches and reservoirs taking water therefrom, according to the prior rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut and fastened, the headgates of ditches, and shall regulate or cause to be regulated the controlling works of reservoirs, in times of scarcity of water, as may be necessary by reason of the priorities of right existing from said streams of his district. Such water commissioner shall have authority to regulate the distribution of water among the various users under any partnership ditch or reservoir where rights have been adjudicated, in accordance with existing decrees. Whenever, in the pursuance of his duties, the water commissioner regulates a headgate to a ditch or the controlling works of reservoirs, it shall be his duty to attach to such headgate or controlling works a written notice properly dated and signed, setting forth the fact that such headgate or controlling works has been properly regulated and is wholly under his control and such notice shall be a legal notice to all parties interested in the division and distribution of the water of such ditch or reservoir. It shall be the duty of the county and prosecuting attorney to appear and defend the division superintendent or any water commissioner who shall be made a defendant in any case which may arise in the pursuance of the official duties of any such officer within the county of such prosecuting attorney." Rev. Stats. 890; Stats. 1901, c. 102, as amended by Sess. Laws, 1907, c. 86.

"Said water commissioners shall, as near as may be, divide, regulate and control the use of the water of all streams within his district by such closing or partial closing of the headgates as will prevent the waste of water, or its use in excess of the volume to which the appropriator is lawfully entitled," etc. Rev. Stats., sec. 891.

He may make arrests (Rev. Stats. 972). Owners must maintain headgates and measuring devices or the division superintendent may shut off the water (Rev. Stats., sec. 930; Stats. 1901, p.

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99). Disobeying officials is a misdemeanor (Rev. Stats. 971; Stats. 1901, p. 95; Stats. 1907, p. 138, sec. 15). The county prosecuting attorney must defend the officials when sued for their acts (Stats. 1907, p. 138, sec. 7 et seq.). The water commissioners shall begin work when instructed by the division superintendent, or upon written demand of some appropriator (Rev. Stats. 894, amdg. Laws 1907, c. 68).

Text, c. 50.

Determination of Existing Priorities.—Existing priorities are determined by the board of control. A notice of investigation is published, and the division superintendent then begins taking evidence (Rev. Stats. 861). The claimant fills out blanks stating certain prescribed details, and swears thereto (Rev. Stats. 863, 864). If aggrieved by the evidence gathered by the division superintendent, he may have a special hearing (Rev. Stats. 867 et seq.). The State Engineer makes surveys and prepares maps, and these maps are in the hands of the superintendent when he takes proof. The surveys and maps are prepared a year or so in advance by field parties, so as to furnish opportunity for inspection before the division superintendent begins taking testimony of claimant. From these data and the maps the board of control adjudges the right of each claimant (Rev. Stats. 872). The board of control then issues a certificate of appropriation, which is sent by the secretary of the board to the county clerk to be recorded, and after it is recorded the county clerk sends it to the water user interested (Rev. Stats. 873; see, also, Stats. 1907, p. 138, sec. 11).

Laws of 1907, chapter 86, provide: "As soon as practicable after the determination of the priorities of appropriation of the use of waters of any stream, it shall be the duty of the secretary to issue to each person, association or corporation represented in such determination a certificate to be signed by the State Engineer as president of the Board of Control, and attested under seal by the secretary of said board, setting forth the name and postoffice address of the appropriator; the priority date and number of such appropriation; the amount of water appropriated; and if such appropriation be for irrigation, a description of the legal subdivisions of land to which said water is to be applied. Such certificate shall be transmitted by said State Engineer, or by a member of the Board of Control, in person or by registered mail, to the county clerk of the county in which such appropriation shall have been made, and it shall be the duty of the county clerk upon receipt of the recording fee, which fee shall be one dollar, to record the same in a book especially prepared and kept for that purpose, and thereupon immediately transmit the same to the respective appropriators. Said recording fee of one dollar shall be paid to the division superintendent at the time of the submission of testimony and proof of appropriation of water by each such claimant or appropriator before the

[Determination of Existing Priorities]

said division superintendent as provided, by law, and shall be by him or the State Engineer transmitted with each certificate of appropriation to the county clerk of the county in which said certificate is to be recorded, and his receipt taken therefor, which said receipt shall be filed in the State Engineer's office" (Rev. Stats., sec. 873, as amended by Sess. Laws 1907, c. 86).

Failure to appear forfeits claim unless claimant had no actual notice of the proceedings, beyond the service by publication, in which case he may have the determination opened within one year (Stats. 1901, c. 67, sec. 2). When the State Engineer makes surveys, all irrigated land is located and the owners thereof are identified, so that the possibility of missing water users in this work is very remote. The board of control may order a rehearing within one year, or an appeal may be taken to court within sixty days (Rev. Stats. 874, 883; Stats. 1901, p. 70), otherwise the board's orders or decrees are declared conclusive against the world (Stats. 1901, c. 67, sec. 1). But see Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210; Ryan v. Tutty, 13 Wyo. 122, 78 Pac. 661).

A special statutory proceeding exists to settle disputes between tenants in common (see Rev. Stats., sec. 915. See, also, Stats. 1907, p. 138, sec. 7 et seq., and secs. 20, 22), issuing certificates to each. The provision of the law referred to here is to protect all users when a stream and all of its tributaries are finally adjudicated. A small tributary may be taken up first. Other tributaries are taken up as the demand for a determination of rights may be manifested. When the main stream and all remaining tributaries are taken up, should there be conflicting rights in the entire system, an opportunity is given for final settlement.

Text, c. 18.

Method of Appropriating.—Before commencing (or enlarging), application must be made to the State Engineer, stating certain details on a form prescribed by him (Rev. Stats. 917), accompanied by duplicate maps (Rev. Stats. 924 et seq., 918; Stats. 1907, p. 138, secs. 13, 14; Comp. Laws 1910, sec. 727 et seq.).

"It shall be the duty of the State Engineer to approve all applications made in proper form which contemplate the application of the water to a beneficial use and where the proposed use does not tend to impair the value of existing rights or be otherwise detrimental to the public welfare; but where there is no unappropriated water in the proposed source of supply, or where the proposed use conflicts with existing rights, or

[Method of Appropriating]

threatens to prove detrimental to the public interest, it shall be the duty of the State Engineer to reject such application and refuse to issue the permit asked for." (*Ibid.*)

Beginning work without a permit is a crime *(Ibid.)*. Reservoir applications need not enumerate lands, but all ditch applications must describe lands where the water is to be used, and if the water is from a reservoir, a special application called a "secondary" application must be filed for the ditch, specifying lands, etc. (Stats. 1907, p. 138, sec. 16). He keeps a record of date of receipt of application *(Ibid.)*. If approved, he so indorses it and returns it to applicant, who may then go ahead (Rev. Stats. 920), and who must begin within a time fixed by the State Engineer (not over one year), and must complete it in a time likewise fixed, not over five years (Rev. Stats. 922). An appeal lies from the State Engineer to the board of control, and then to court (Rev. Stats. 923). Upon "perfection of the appropriation," a certificate is sent to the appropriator and recorded in the office of the county clerk (Rev. Stats. 928). That is, when a water user satisfies the board of control that the water has been beneficially used in compliance with the terms of the permit, a certificate of appropriation is issued by the board, and sent to the proper county clerk for record and by him sent to the water user.

Priority dates from the filing of the application with the State Engineer (Rev. Stats. 929).

Reservoirs.—Concerning dams over five feet in height, permit is required from the State Engineer (Stats. 1903, p. 74; see, also, Rev. Stats., sec. 91; Comp. Laws 1910, secs. 743 et seq. and 825 et seq.).

Floating Logs, etc.—Permits must be obtained from the State Engineer (Stats. 1903, c. 16; Comp. Laws 1910, sec. 828).

Fees of State Engineer.—Statutes of 1905, chapter 82, amending Revised Statutes, section 108: "The State Engineer shall receive the following fees, which shall be collected in advance, and be paid by him into the general fund of the State treasury as by law provided: For filing and examining applications for permits to appropriate water and maps of same, two dollars. For recording any water-right instrument not specified above, one dollar for the first one hundred words, and for each additional folio, fifteen cents. For issuing certificates of appropriation of water,

[Fees of State Engineer]

one dollar; provided that said fee of one dollar shall be by each appropriator or claimant paid to the water division superintendent at the time of the submission of testimony and proof of appropriation of water by such appropriator or claimant, before the said division superintendent, as by law provided, which said fee shall be by said superintendent immediately turned over to the said State Engineer, and his receipt taken therefor and filed in the records of the board of control. For making certified copies of any document recorded or filed in the State Engineer's office, one dollar for the first folio and fifteen cents for each subsequent folio, and for each certificate attached thereto, one dollar."

Text, §§ 486, 487.

Duty and Measurement of Water.—The standard of measurement is one cubic foot per second (Rev. Stats. 968). No allotment for irrigation shall exceed one cubic foot per second for each seventy acres of land (Rev. Stats. 872). "Rights to the use of water shall be limited and restricted to so much thereof as may be necessarily used for irrigation or other beneficial purposes as aforesaid; irrespective of the carrying capacity of the ditch," etc. (Stats. 1907, p. 138, sec. 12; Rev. Stats. 895).

Text, Part VII.

Public Service—Water Companies and Consumers.—There was a provision upon the statute books that: "Every such owner or owners having a surplus of water and furnishing the same to others from any ditch, canal or reservoir as herein provided, shall be considered common carriers and shall be subjected to the same laws that govern common carriers" (Sess. Laws 1907, c. 86, p. 138, sec. 12; Rev. Stats., sec. 741). This is contained in the 1910 compilation by the State Engineer of the Wyoming water laws; but there appears doubt whether it remains in force. Primary permits are issued for storing water, and secondary permits are issued for the ditches that carry such water to the land (Laws 1903, c. 69, sec. 2). "The use of water stored under the provisions of this chapter may be acquired on such terms as shall be agreed upon by and between the parties in interest." (Rev. Stats., sec. 749; Laws 1903, c. 69, sec. 7; Laws 1905, c. 14.) Mutual companies may levy assessments on their stockholder water users (Rev. Stats. 976).

Text, c. 58.

Irrigation Districts.—Irrigation districts based upon the Wright Act of California are provided in the Statutes of 1907, page 103 (Comp. Laws 1910, sec. 829 et seq.). Amended by Statutes of 1911, chapter 31, page 44, regarding bonds; also amended in Statutes of 1911, chapter 99, page 162. See, further, Statutes of 1911, chapter 95, page 139, regarding drainage districts.

Text, c. 59.

Carey Act.—The Carey Act has been extensively used in Wyoming. Its conditions were accepted in Revised Statutes, section 934. Any system built thereunder must be begun within six months from the date of contracting with the State, and one-tenth of the work completed within one year, one-third within two years, and all completed within five years, and cessation of work for ninety days during May to November after the second year will forfeit all rights (Rev. Stats., sec. 947, as amd. in Laws 1909, c. 160). Water-rights under the act shall be appurtenant to the land (Rev. Stats. 955. See, also, Stats. 1911, c. 94, p. 138).

Miscellaneous.—Among the many provisions of the statutes, the following additional may be specially noted.

Water-rights Defined. Changes Prohibited. Beneficial Use.—"A water-right is a right to use the water of the State when such use has been acquired by the beneficial application of water under the laws of the State relating thereto, and in conformity with the rules and regulations dependent thereon. Beneficial use shall be the basis, the measure and limit of the right to use water at all times, not exceeding in any case the statutory limit of volume. Water being always the property of the State, rights to its use shall attach to the land for irrigation, or to such other purpose or object for which acquired, in accordance with the beneficial use made and for which the right receives public recognition, under the law and administration provided thereby. Water-rights cannot be detached from the lands, place or purpose for which they are acquired, without loss of priority." Stats. 1909, c. 68, p. 112, sec. 1; Comp. Laws 1910, sec. 724.

"Rights to the use of water shall be limited and restricted to so much thereof as may be necessarily used for irrigation or other beneficial uses as aforesaid, irrespective of the carrying capacity of the ditch, and all the balance of the water not so appropriated shall be allowed to run in the natural stream from which such ditch draws its supply of water, and shall not be considered as having been appropriated thereby; and in case the owner or owners of any such ditch, canal or reservoir shall fail to use the water therefrom for irrigation or other beneficial purposes during any five successive years, they shall be considered as having abandoned the same, and shall forfeit all water-rights, easements and privileges appurtenant thereto, and the water formerly appropriated by them may be again appropriated for irrigation and other beneficial purposes, the same as if such ditch, canal or reservoir had never been constructed; neither shall the owner or owners of such ditch, canal or reservoir have any right to receive from others any royalty for the use of water carried thereby."

[Miscellaneous]

(Rev. Stats., sec. 895; Stats. 1907, c. 86.) Wasto of water is a misdemeanor (Laws 1901, c. 86, sec. ——).

Rotation.—"To bring about a moro economical use of the available water supply, it shall bo lawful for water users owning lands to which are attached water-rights, to rotate in the use of the supply to which they may be collectively entitled; or a single water user, having lands to which water-rights of a different priority attach, may in like manner rotate in use, when such rotation can be made without injury to lands enjoying an earlier priority." (Sess. Laws 1909, c. 108, sec. 1.)

Interstate Streams.—"The attorney general, under the direction of the governor of the State, is authorized and directed to institute and maintain such proceedings as he may deem expedient to maintain the rights of the State and its citizens in the waters of interstate streams." Laws 1911, c. 43, p. 57.

Various.—Five years' successive nonuse causes loss of right (Stats. 1907, p. 138, sec. 12; Rev. Stats., sec. 741). Concerning injunction suits, detailed provisions appear in the Statutes of 1907, page 138, section 21. Conveyances of irrigation works must be recorded in the State Engineer's office in order to bind subsequent *bona fide* purchasers (*Ibid.*, sec. 22). This only relates to *irrigation works* and not to water-rights. Voluntary settlements may be recorded and cannot be attached after ten years (*Ibid.*, sec. 23 et seq.). A curious section provides for proceedings in equity to settle disputes (sec. 27) with a proviso; "provided, that the provisions of sections 22, 23, 24, 25, 26 and 27 of this act shall not be construed to relate to water-rights or any way to conflict with the laws governing the same." A license is required of all hydraulic engineers to practice their profession (*Ibid.*, sec. 28). Regarding water-rights of towns, see Constitution, article 13, section 5; Statutes of 1907, page 150. Regarding ditches on highways, see Statutes of 1907, page 62. Pollution of water is a crime (Stats. 1907, p. 44). Concerning liability for damage from overflow, etc., see Revised Statutes, sections 901, 974, 3069. An act of 1911, chapter 29, page 43, confirms the water-rights of corporations whose articles of incorporation had not mentioned acquisition of water-rights among their purposes as originally incorporated.

The foregoing digest of the Wyoming laws has had the benefit of revision by Mr. Clarence T. Johnston, who has extensive knowledge of these laws, and since 1901 has borne much of the responsibility of framing them. Mr. Johnston, in commenting upon the purpose of these laws, writes:

"Had the United States government failed to have made provision for the survey of public land and to have established land offices which enable settlers to obtain lands in an orderly way and then protect them, our land titles would comparo favorably with water titles in those States where no State supervision has been provided. I presume that under a system without central control of public land titles, each settler would have claimed as much land as possible. He would not know his boundaries. His neighbors would have been in the same condition. They would quarrel among themselves and finally go to the court for some kind of settlement of their difficulties. One court might hold that some English common-law principle should prevail,—another might invoke some new doctrine that seemed reasonable at the time. One settler might obtain all of the land he claimed, because he was the first entryman, or the first person to estab-

lish residence. Another court might hold that the man who built the most expensive residence should obtain the largest area of land. These contentions would be similar to the doctrines of priority and the rule which enables the builders of canals to obtain title to water in proportion to the carrying capacity of such irrigation works. If the court held that each settler should have such an area of land as might be necessary to support a family when properly cultivated, this would compare with the rule of some of the States which provides that each water user shall be entitled to as much water as can be applied beneficially.

"The advantage of the Wyoming law is that it provides a method whereby existing claims can be established promptly, and without great expense. In these determinations, all claimants are included, because the State Engineer finds all irrigated land when he makes his surveys. Further, under the permit system the date of priority of the right is fixed by the filing of the application for permit, and the builder of irrigation works is thoroughly protected during the time when construction work is in progress. A foundation is laid for the determination of all claims on a just and uniform basis, and this means that administration is greatly simplified, and also that litigation which always follows excessive allotments of water is eliminated. Litigation is practically unknown in Wyoming in so far as water-rights are concerned. There is less litigation there over water questions than there is relative to land titles. The State, having legal authority over streams, is in position to regulate the construction of dams and to insure safety to those who live below dams which provide reservoirs for extensive storage. The object of the law in general is to protect the individual by adopting those principles which protect communities. As long as the community is protected, the individual will not suffer, and the individual will certainly not be given 'rights' which will enable him to profit at the expense of the community."

Wyoming Statutes Construed.—In the earlier parts of this book (Parts I to VII, inclusive) Wyoming Statutes are construed or cited upon the following pages:

Constitution.

Art. 1, sec. 13 .....1097, 1166
Art. 1, sec. 31 .....143, 194
Art. 8, sec. 1 .....194, 1236
Art. 8, sec. 2 1097
Art. 8, sec. 3 .....120, 309, 338, 444
Art. 8, sec. 4 1099
Art. 8, sec. 5 1098
Art. 13, sec. 5 350

Compiled Laws.

Comp. Laws 1867 (1876), c. 65, sec. 1..... 144
Comp. Laws 1910, sec. 829 1264

Revised Statutes, 1899.

Rev. Stats. 848 1099
Rev. Stats. 861 1117
Rev. Stats. 872 .....523, 1117
Rev. Stats. 873 1118

Revised Statutes, 1899—Continued.

Rev. Stats., sec. 874 1117
Rev. Stats., sec. 883 1117
Rev. Stats., sec. 888 1099
Rev. Stats., sec. 889 1099
Rev. Stats., sec. 894 1111
Rev. Stats., sec. 895 ..... 506, 619, 620, 1244
Rev. Stats. sec. 901 490
Rev. Stats., sec. 915 345
Rev. Stats., sec. 917 733
Rev. Stats., sec. 918 733
Rev. Stats., sec. 924 733
Rev. Stats., sec. 929 453
Rev. Stats., sec. 930 ..... 542, 1100
Rev. Stats., sec. 931 440
Rev. Stats., sec. 934 1266
Rev. Stats., sec. 947 1270
Rev. Stats., sec. 955 1267
Rev. Stats., sec. 968 521
Rev. Stats., sec. 971 ..... 733, 1100
Rev. Stats., sec. 972 1100
Rev. Stats., sec. 974 490
Rev. Stats., sec. 976 1173
Rev. Stats., sec. 1317 144
Rev. Stats., sec. 3069 490
Rev. Stats. (1887), sec. 1344 194

Session Laws.

Laws 1869, c. 22, p. 310 387
Laws 1869, c. 22, pp. 310, 311, secs. 15–17 121
Laws 1886, c. 61, p. 294 367
Laws 1888, c. 55, sec. 14 620
Laws 1901, c. 66 733
Laws 1901, c. 67, sec. 1 1118
Laws 1901, c. 67, sec. 2 1117
Laws 1901, c. —, p. 70 1117
Laws 1901, c. 86, pp. 95, 99 ..... 733, 1100
Laws 1903, c. 16, sec. 1 408
Laws 1903, c. 69, p. 74 440
Laws 1903, c. 69, sec. 2 ..... 1237, 1244
Laws 1905, p. —, c. 14 1213
Laws 1905, p. 26 150
Laws 1905, p. 36 620
Laws 1905, p. 147 549
Laws 1907, p. 44 569
Laws 1907, p. —, c. 52 657
Laws 1907, p. 103, c. 72 1264

Session Laws—Continued.

Laws 1907, p. 138, c. 86.....345, 576, 733, 1111, 1244
Laws 1907, p. 138, c. 86, sec. 12.....503, 506, 620, 1162, 1166
Laws 1907, p. 138, c. 86, secs. 13-15 733
Laws 1907, p. 138, c. 86, sec. 21 726
Laws 1907, p. 138, c. 86, sec. 22 580
Laws 1907, p. 353 233
Laws 1909, c. —, p. 105 1266
Laws 1909, c. 68, p. 112 556
Laws 1909, c. 68, p. 112, sec. 1.....194, 297, 537, 547, 551
Laws 1909, c. 68, p. 112, sec. 2 324
Laws 1909, c. 68, p. 112, sec. 3 671
Laws 1909, c. 96 657
Laws 1909, c. 108 509
Laws 1909, c. —, p. 222 1266
Laws 1911, c. 29, p. 43 349
Laws 1911, c. 31, p. 44 1264
Laws 1911, c. 43, p. 57 365
Laws 1911, c. 94, p. 138 1266
Laws 1911, c. 95, p. 139 .....379, 1264
Laws 1911, c. 99, p. 139 1264

PART IX.
FORMS.

The following forms, with the exception of that given for California, have been adopted by the State Engineers of the States having statutes prescribing forms, as set forth in the previous pages. In Wyoming these forms have been in use for over fifteen years. In printing these forms in this book, the vacant spaces have been shortened to a line or less, though some of the forms leave sufficient space in places to write in several lines of description. For the forms following, the writer is greatly indebted to the State Engineers of the respective States. Only the main forms are here given, and persons having occasion to use these forms should get into direct communication with the State Engineer, who will furnish printed blanks and give further practical information.

All instructions or statements of law are reprinted as issued by the State Engineer. No remarks of any kind by the author are included. The matter in the following pages consists exclusively of publications issued by official sources, reprinted without comment of any kind.

(3d ed.)

§ 1459. FEDERAL FORMS.

(1911.)

RECLAMATION SERVICE FORMS.

Notice of appropriation by the United States.
Water users associations.

RIGHT OF WAY AND RESERVOIR SITE FORMS.

Forms of General Land Office, numbers 1 to 12.

FOREST SERVICE WATER-POWER FORMS.

Form 58. Application for preliminary water-power permit.
Form 59. Preliminary water-power permit.
Form 60. Application for final water-power permit.
Form 61. Water-power stipulation.
Form 62. Final water-power permit.
Form 63. Transmission line permit.

Reclamation Service.

Notice of Water Appropriation by the United States.

....., Engineer, United States Geological Survey, thereunto duly authorized by the Secretary of the Interior, for and on behalf of the United States of America, under the provisions of the act of Congress approved June seventeenth, nineteen hundred and two (32 Stat. L. 388), claims, at the point where this notice is posted, all the unappropriated waters of the ..... River, both surface and underflow, more specifically stated as amounting to ..... cubic feet per second.

This notice is posted on ....., 19.., on a ..... tree on the ..... bank of the ..... River, in sec. ..... T. ..... R. ....., ... M., at a point distant ..... feet and bearing ..... from the ..... corner of said section.

The water is to be used for irrigation, domestic, power, mechanical, and other beneficial uses in and upon lands situated in ..... counties, and located in the following townships:

....

The water hereby appropriated is to be stored by means of a dam located in sec. ....., T. ....., R. ....., in a reservoir located in Ts. ....., R. ....., and will be conducted to the points of intended use by means of canals, flumes, pipes, tunnels, or other appropriate means of conveying water, of the following dimensions, ..., or such other equivalent dimensions and grade as will give a capacity of ..... cubic feet per second.

Affidavit.

....., being duly sworn, deposes and says that on ....., 19.., he did post a notice of appropriation of water, of which the foregoing is a copy, for ..... cubic feet per second of the waters of ..... River, on a ..... tree at a point described as follows: [Describe exactly as in notice.]

Water Users Associations.

(Forms of articles of incorporation, by-laws and contract with Secretary of Interior are given *supra*, chapter 63. Other forms are published in pamphlet form by the Department of Interior. Regarding forms of water-right certificates under the Reclamation Service, see, also, 39 Land Dec. 197.—THE AUTHOR.)

Rights of Way and Reservoir Sites.

(Regulations of General Land Office. Approved June 6, 1908.)

Form 1.

I, ..., secretary [or president] of the ..... Company, do hereby certify that the organization of said company has been completed; that the company is fully authorized to proceed with construction, according to the existing laws of the State [or Territory] of ....., and that the copy of the articles of association (or incorporation) of the company filed in the Department of the Interior is a true and correct copy of the same.

In witness whereof I have hereunto set my name and the corporate seal of the company this .... day of ....., in the year 19..

[Seal of Company.]

....., ... of the ..... Company.

Form 2.

I, ..., do certify that I am the president of the ..... Company, and that the following is a true list of the officers of the said company, with the full name and official designation of each, to wit: [Here insert the full name and official designation of each officer.]

In witness whereof I have hereunto set my name and the corporate seal of the company this .... day of ....., in the year 19..

[Seal of Company.]

....., President of the ..... Company.

Form 3.

State of .....,
County of .....,—ss.

....., being duly sworn, says he is the chief engineer of [or the person employed to make the survey by] the ..... Company; that the survey of said company's [canals,

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ditches, and reservoirs], described as follows: [Here describe each canal, ditch, lateral, and reservoir for which right of way is asked, as required by section 21, being a total length of canals, ditches, and laterals of ..... miles, and a total area of reservoirs of ..... acres], was made by him [or under his direction] as chief engineer of the company [or as surveyor employed by the company] and under its authority, commenced on the .... day of ....., 19.., and ending on the .... day of ....., 19.. [and that the survey of the said (canal, ditches, laterals, and reservoirs) accurately represents (a proper grade line for the flow of water, and accurately represents a level line, which is the proposed water line of the said reservoir)], and that such survey is accurately represented upon this map and by the accompanying field-notes. [And no lake or lake bed, stream or stream bed, is used for the said (canals, ditches, laterals, and reservoirs) except as shown on this map. (This clause to be omitted in applications for telephone and telegraph lines.)]

....., ...

Sworn and subscribed to before me this .... day of ....., 19..

[Seal] ....., Notary Public.

Form 4.

I, ..., do hereby certify that I am president of the ..... Company; that ....., who subscribed the accompanying affidavit, is the chief engineer of [or was employed to make the survey by] the said company; that the survey of the said [canals, ditches, laterals, and reservoirs], as accurately represented on this map and by the accompanying field-notes, was made under authority of the company; that the company is duly authorized by its articles of incorporation to construct the said [canals, ditches, laterals, and reservoirs] upon the location shown upon this map; that the said [canals, ditches, laterals, and reservoirs], as represented on this map and by said field-notes, was adopted by the company, by resolution of its board of directors, on the .... day of ....., 19.., as the definite location of the

said [canals, ditches, laterals, and reservoirs] described as follows: [Describe as in Form 3]—[and that no lake or lake bed, stream or stream bed, is used for the said (canals, ditches, laterals, and reservoirs) except as shown on this map. (This clause to be omitted in applications for telephone and telegraph lines)]; and that the map has been prepared to be filed for the approval of the Secretary of the Interior, in order that the company may obtain the benefits of [sections 18 to 21, inclusive, of the act of Congress approved March 3, 1891, entitled "An act to repeal timber-culture laws, and for other purposes," and section 2 of the act approved May 11, 1898. (Here insert the description of the act of Congress under which the application is made when filed under some other act than that of 1891 and 1898)]; and I further certify that the right of way herein described is desired for the main purpose of irrigation. [Or, where filed under other acts than that of 1891 and 1898, state the purposes for which right of way is applied for.]

....., President of the ..... Company.

Attest: ....., Secretary.

[Seal of Company.]

Form 5.

State of .....,
County of .....,—ss.

....., being duly sworn, says that he is the chief engineer of [or was employed to construct] the [canals, ditches, laterals, and reservoirs] of the ..... Company; that said [canals, ditches, laterals, and reservoirs] have been constructed under his supervision, as follows: [Describe as required in section 21] a total length of constructed [canals, ditches and laterals] of ..... miles, and a total area of constructed reservoirs of ..... acres; that construction was commenced on the .... day of ....., 19.., and completed on the .... day of ....., 19..; that the constructed [canals, ditches, laterals, and reservoirs], as aforesaid, conform to the map and field-notes which re-

[Rights of Way and Reservoir Sites]

ceived the approval of the Secretary of the Interior on the .... day of ....., 19..

.....,

....

Sworn and subscribed to before me this .... day of ....., 19..

[Seal] .....,

Notary Public.

Form 6.

I, ..., do certify that I am the president of the ..... Company; that the [canals, ditches, laterals, and reservoirs] described as follows [describe as in Form 5] were actually constructed as set forth in the accompanying affidavit of ....., chief engineer [or the person employed by the company in the premises], and on the exact location represented on the map and by the field-notes approved by the Secretary of the Interior, on the .... day of ....., 19..; and that the company has in all things complied with the requirements of the act of Congress [March 3, 1891, granting right of way for canals, ditches, and reservoirs through the public lands of the United States. (Here insert the description of the act of Congress under which the application is made when filed under some other act than that of 1891.)]

.....,

President of the ..... Company.

[Seal of Company.]

Attest:

.....,

Secretary.

[Rights of Way and Reservoir Sites]

Form 7.

[Under Act of February 15, 1901.]

State of .....,
County of .....,—ss.

....., being duly sworn, says he is the chief engineer of [or the person employed by] the ..... Company, under whose supervision the survey was made of the grounds selected by the company for structures for electrical purposes under the act of Congress approved February 15, 1901, said grounds [here describe as required by sections 41 and 50]; that the accompanying drawing correctly represents the locations of the said structures; and that in his belief the structures represented are actually and to their entire extent required for the necessary uses contemplated by the said act of February 15, 1901 (31 Stat. 790).

.....,
Chief Engineer.

Subscribed and sworn to before me this .... day of ....., 19..

[Seal] .....,
Notary Public.

Form 8.

[Under Act of February 15, 1901.]

I, ..., do hereby certify that I am the president of the ..... Company; that the survey of the structures represented on the accompanying drawing was made under authority and by direction of the company, and under the supervision of ....., its chief engineer [or the person employed in the premises], whose affidavit precedes this certificate; that the survey as represented on the accompanying drawing actually represents the structures required [here describe as required by sections 41 and 50] for electrical purposes, under the act of Congress approved February 15, 1901; and that the company, by resolution of its board of directors, passed on the .... day of ....., 19.., directed the proper officers to present the said drawing

[Rights of Way and Reservoir Sites]

for the approval of the Secretary of the Interior in order that the company may obtain the use of the grounds required for said structures, under the provisions of said act approved February 15, 1901 (31 Stat. 790).

....., President of the ..... Company.

[Seal of the Company.]

Attest:

....., Secretary.

Form 9—Reservoir Declaratory Statement.

[Under Act of January 13, 1897 (29 Stat. 484).]

Res. D. S. Land Office at .....,

No. ...., 19..

I, ..., of ..... *do hereby certify that I am president of the ..... Company, and on behalf of said company, and under its authority,* do hereby apply for the reservation of land in ..... County, State of ....., for the construction and use of a reservoir for furnishing water for livestock under the provisions of the act of January 13, 1897 (29 Stat. 484). The location of said reservoir and of the land necessary for its use, is as follows: ..... of section ..... in township ....., of range ..... M., containing ..... acres.

I hereby certify that to the best of my knowledge and belief the said land is not occupied or otherwise claimed, is not mineral or otherwise reserved, and that the said reservoir is to be used in connection with the business of the applicant of.....

.....

.....

.....

The land owned or claimed by the applicant within the vicinity of the said reservoir (within three miles) is as follows:.....

.....

I further certify that no part of the land to be reserved under this application is or will be fenced; that the same shall be kept

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open to the free use of any person desiring to water animals of any kind; that the land will not be used for any purpose except the watering of stock, and that the land is not, by reason of its proximity to other lands reserved for reservoirs, excluded from reservation by the regulations and rulings of the Land Department.

The water of said reservoir will cover an area of ..... acres, in ..... of section ..... in township ....., of range ..... of said lands; the capacity of the reservoir will be ..... gallons, and the dam will be ..... feet high. The source of the water for said reservoir is .....
....
and there are no streams or springs within two miles of the land to be reserved except as follows:.....
....

The applicant has filed no other declaratory statements under this act except as follows:

No. ...., ... land office, area to be reserved ..... acres.
No. ...., ... land office, area to be reserved ..... acres.
No. ...., ... land office, area to be reserved ..... acres.
No. ...., ... land office, area to be reserved ..... acres.
No. ...., ... land office, area to be reserved ..... acres.
No. ...., ... land office, area to be reserved ..... acres.
No. ...., ... land office, area to be reserved ..... acres.
No. ...., ... land office, area to be reserved ..... acres.
No. ...., ... land office, area to be reserved ..... acres.
No. ...., ... land office, area to be reserved ..... acres.

Total, ... acres, of which Nos. ..... are located in said county.

And I further certify that it is the *bona fide* purpose and intention of this applicant to construct and complete said reservoir and maintain the same in accordance with the provisions of said act of Congress and such regulations as are or may be prescribed thereunder.

.....

[Seal of Company.]

Attest:

....., Secretary.

[Rights of Way and Reservoir Sites]

State of .....,
County of .....,—ss.

....., being duly sworn, deposes and says that the statements herein made are true to the best of his knowledge and belief.

.....

Sworn to and subscribed before me this .... day of ....., in the year 19..

[Seal] .....,
Notary Public.

NOTE.—When the applicant is a corporation the form should be executed by its president, under its seal, and attested by its secretary. When the applicant is not a corporation or an association of individuals, strike out the words in italics.

Land Office at .....,
....., 19..

I, ..., register of the land office, do hereby certify that the foregoing application is for the reservation of lands subject thereto under the provisions of the act of January 13, 1897; that there is no prior valid adverse right to the same; and that the land is not, by reason of its proximity to other lands reserved for reservoirs, excluded from reservation by the regulations and rulings of the Land Department.

Fees, $....., paid.

.....,
Register.

The description of the business of the applicant should include "a full and minute statement of the extent to which he is engaged in breeding, grazing, driving, or transporting livestock, giving the number and kinds of such stock, the place where they are being bred or grazed, and whether within an inclosure or upon uninclosed lands, and also from where and to where they are being driven or transported." Circular June 23, 1899.

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Form 10.

State of .....,
County of .....,—ss.

....., being duly sworn, says that he is the person who was employed to make the survey of a reservoir covering an area of ..... acres, the initial point of the survey being ..... [here describe as required by section 21]; said reservoir having been constructed upon the ..... quarter of the ..... quarter of section ....., township ....., range ....., ... principal meridian, as proposed by reservoir declaratory statement No. ...., which was filed in the local land office at ....., under the provisions of the act of January 13, 1897 (29 Stat. 484); that the said survey was made on the .... day of ....., 19..; that the dam and all necessary works have been constructed in a substantial manner; that the reservoir has a capacity of ..... gallons, and at the time of said survey contained ..... gallons of water.

....

Sworn and subscribed to before me this .... day of ....., 19...

[Seal] ....
Notary Public.

Form 11.

I, ..., do certify that I am the president of the ..... Company which filed [or that I am the person who filed] reservoir declaratory statement No. ...., in the local land office at .....; that the reservoir proposed has been constructed upon the ..... quarter of the ..... quarter of section ....., township ....., range ....., ... principal meridian, covering an area of ..... acres, the initial point of the survey being ..... [describe as in Form 10]; that the dam and all necessary works have been constructed in a substantial manner in good faith in order that the reservoir may be used and maintained for the purposes and in the manner prescribed by the said act of January

[Rights of Way and Reservoir Sites]

13, 1897 (29 Stat. 484), the provisions of which have been and will be complied with in all respects.

[Seal of Company.] ....., President of the Company.

Attest:

....., Secretary.

Form 12.

State of .....,
County of .....,—ss.

....., being duly sworn, deposes and says that he is the president of the ..... Company which filed [or that he is the person who filed] reservoir declaratory statement No. ...., in the local land office at .....; that the reservoir constructed in pursuance thereof, as heretofore certified, has been kept in repair; that water has been kept therein to the extent of not less than ..... gallons during the entire calendar year of 19....; that neither the reservoir nor any part of the land reserved for use in connection therewith is or has been fenced during said years, and that the said company has in all things complied with the provisions of the act of January 13, 1897 (29 Stat. 484).

....., President of ..... Company.

Sworn and subscribed to before me this .... day of ....., 19...

[Seal] ....., Notary Public.

FOREST SERVICE WATER-POWER FORMS.

APPLICATION FOR PRELIMINARY WATER-POWER PERMIT.

Form 58.

United States Department of Agriculture, Forest Service.

.....
(Name of Forest.)

.....
(Name of applicant.)

.....
(Use applied for.)

....., (Date of priority of application.)

Application for Preliminary Water-power Permit.

The ....., a corporation organized and existing under and by virtue of the laws of the State [or Territory] of ....., and having its office and principal place of business at ....., in the State [or Territory] of .....

....., citizen of the United States and resident of the State [or Territory] of ....., do hereby make application for a preliminary permit for ..... months, covering certain lands of the United States within the ..... National Forest in the State [or Territory] of ..... as such lands are approximately shown upon a certain map executed by ....., on the .... day of ....., 19.., which map is filed herewith and made a part hereof. This application is made in order that .... may, upon the filing of a complete and final application in accordance with the regulations of the Secretary, secure a priority for said final application from the date of the filing of this preliminary application.

....

(Space for insertion of request for construction work if necessary to maintain water-rights.

In witness whereof, ... ha.. caused this instrument to be executed this .... day of ....., 19...

.....

[Seal of corporation.]

Attest:

....., Secretary.

(Form 58a contains certificate of receipt of preliminary application.)

[Forest Service Water-power Forms]

PRELIMINARY WATER-POWER PERMIT.

Form 59.

United States Department of Agriculture,
Office of the Secretary.

....., Water-power.
(Name of Forest.)
.....
(Name of applicant.)
.....
(Use applied for.)
.....,
(Date of priority of application.)

Preliminary Water-power Permit.

This preliminary permit issued this .... day of ....., 19.., to the ..... Company, hereinafter called the permittee, a corporation organized and existing under and by virtue of the laws of the State [or Territory] of ....., and having its office and principal place of business at ....., in the State [or Territory] of ....., Witnesseth: That,

Whereas the permittee filed with the District Forester at ....., ..., on the .... day of ....., 19.., at .... M., an application for a preliminary permit, in accordance with the regulations of the Department of Agriculture;

And whereas the permittee, on the .... day of ....., 19.., paid to the ..... National Bank of ..... (United States depositary), to be placed to the credit of the United States, the sum of ..... dollars ($.....);

Now, therefore, the conditions of this permit are as follows:

Clause 1. If the permittee shall, on or before the .... day of ....., 19.., file with the District Forester at ...., in the manner prescribed by the regulations and instructions of the Secretary of Agriculture, a complete and final application for a permit to occupy and use lands of the United States within the ..... National Forest as shown upon a certain map executed by ....., on the .... day of ....., 19.., and made a part of the aforesaid preliminary application for (1) ..... reservoir ..... to be located approximately as shown upon the aforesaid map; (2) ..... conduit ..... to be

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located between points of diversion and discharge as approximately shown upon the aforesaid map; and (3) ..... power-house site ..... to be located approximately as shown on the aforesaid map; then and thereupon said final application shall, with reference to priority of application, relate back and be effective as of the date of the aforesaid preliminary application, and the priority of the permittee's application for a permit to occupy and use the lands of the United States, as such lands are shown in its final application shall be established as against any other application for a like use, covering in whole or in part the same lands, which may have been filed subsequently to the filing of the aforesaid preliminary application.

Provided, however, that if the permittee shall include in said final application lands covering developments not comprehended by its preliminary application, the priority of its application for such additional lands shall date only from the date of the filing of said final application.

Clause 2. The permittee shall pay to the ..... National Bank of ..... (United States depositary), or such other government depositary or officer as may hereafter be legally designated, to be placed to the credit of the United States the following amounts on or before the following dates, to wit: ....., ..., 19.., ... dollars ($.....).

Clause 3. If any one or any part of the amounts named in Clause 2 hereof shall, after due notice has been given, be in arrears for sixty (60) days, then and thereupon this permit shall terminate and become void.

Clause 4. If upon the filing of the said final application a water-power permit is granted by the Secretary of Agriculture to the permittee to occupy and use the aforesaid lands for the construction, maintenance, and, or, operation of the aforesaid works; all payments made in consideration of this preliminary permit shall be credited to the permittee and be applied to the payment of charges due, or to become due, under the said water-power permit: *Provided, however,* that if such final application provides for only a partial development of the project or projects, as outlined in the aforesaid preliminary application and as protected by this permit, then only such proportional part of the aforesaid payments shall be credited to the permittee as the amount of development provided

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for in said final application bears to the amount of development indicated in said preliminary application.

Clause 5. This permit shall terminate and become void upon the date named in Clause 1 hereof, unless extended by the written consent of the Secretary of Agriculture, and such extension shall not be granted unless the completion of the final application has been prevented by unusual climatic conditions that could not reasonably have been foreseen, or by some special or peculiar cause beyond the control of the permittee; and if at the date of the termination of this permit as named in Clause 1 hereof, or at the date of the termination of any extension of time as herein provided, the permittee has failed to present a complete and final application in the manner and in the form prescribed in Clause 1 hereof, then and thereupon the aforesaid priority shall be lost, and no other application covering in whole or in part the same or adjacent lands will be accepted from the permittee for a period of one year subsequent to the date of the termination of this permit or to the date of the termination of any extension thereof.

Clause 6.[1] This permit shall give no right to begin construction of any kind or to cut or destroy any timber upon National Forest lands; but shall give only the right to establish priority of application as hereinbefore provided.

Clause 6.[1] The permittee is hereby authorized to begin the construction of the following works: ....

Clause 7. This permit is nontransferable.

In witness whereof, I have hereunto set my name this .... day of ....., 19...

....., Secretary of Agriculture.

[1] Cancel form of clause not used.

[Forest Service Water-power Forms]

APPLICATION FOR FINAL WATER-POWER PERMIT.

Form 60.

United States Department of Agriculture,
Forest Service.

.....
(Name of Forest.)

.....
(Name of applicant.)

.....
(Use applied for.)

.....
(Date of priority of application.)

Application for Final Water-power Permit.

The ....., a corporation organized and existing under and by virtue of the laws of the State [or Territory] of ....., and having its office and principal place of business at ....., in the State [or Territory] of .....

....., citizen of the United States and resident of the State [or Territory] of ....., do hereby make application for permission to occupy and use certain lands of the United States within the ..... National Forest in the State [or Territory] of ..... by constructing, maintaining, and, or, operating thereon for the main purpose of the generation of electric power, the following works:

[Cancel such of the four following items *(a)*, *(b)*, *(c)*, *(d)* as may not be applicable.]

(a) ..... dams approximately
(Masonry, earth, etc., diverting or storage.)
..... feet in maximum height, and approximately ..... feet in maximum length, to occupy approximately ..... acres, respectively, and to form ..... reservoirs to flood approximately ..... acres at extreme flood level and approximately ..... acres at spillway level, respectively;[1] in section ....., township ....., range ....., ... meridian, of which total of ..... acres approximately ..... acres are National Forest land; said dams and said reservoirs being designated respectively as follows: .....

[1] If land is unsurveyed, substitute for the description by legal subdivisions in paragraphs *(a)*, *(b)*, *(c)*, and *(d)* the following: "Located on certain lands described and shown by the maps and field-notes accompanying the application filed with the District Forester on the .... day of ....., 19..."

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(b) ..... conduits approximately ..... miles in length, respectively,[1] crossing sections ....., township ....., range ....., ... meridian, of which total of ..... miles approximately ..... miles will lie upon National Forest land, said conduits being designated respectively as follows: .....

(c) ..... power-houses and appurtenant structures to occupy approximately ..... acres, respectively,[1] in section ....., township ....., range ....., ... meridian, of which total of ..... acres approximately ..... acres are National Forest land; said power-houses being designated respectively as follows: .....

(d) ..... transmission lines ..... miles in length, respectively,[1] crossing sections ....., township ....., range ....., ... meridian, of which total of ..... miles approximately ..... miles will cross National Forest land; said transmission lines being designated as follows: .....

All as approximately shown upon certain maps and plans executed by ....., on the .... day of ....., 19.., which maps and plans are filed together herewith and designated as follows: [Designate each original of map or plan as "Exhibit A," "Exhibit B," etc., following each such designation by the title of the map or plan as "Exhibit A," Map of location of, etc.; "Exhibit ....," Plan of, etc.], which maps and plans, together with certain field-notes, estimates and data, evidence of water-rights, articles of incorporation, and evidence of authority to conduct business, designated respectively as "Exhibit ....," "Exhibit....," "Exhibit ....," "Exhibit ....," and "Exhibit ....," are hereby made a part of this application.

This application has been prepared to be filed in accordance with the regulation of the Secretary of Agriculture, in order that ..... may obtain the benefits of the act of Congress approved February 15, 1901, entitled "An act relating to rights of way through certain parks, reservations, and other public lands"; and that the use and occupation of the lands for which this application is made is desired for the purpose of generating electric power

[1] If land is unsurveyed, substitute for the description by legal subdivisions in paragraphs *(a)*, *(b)*, *(c)*, and *(d)* the following: "Located on certain lands described and shown by the maps and field-notes accompanying the application filed with the District Forester on the .... day of ....., 19..."

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..... [Add use to which power is to be put and any other purpose for which land may be desired.]

In witness whereof ..... ha.. caused this instrument to be executed this .... day of ....., 19..

.....

[Seal of corporation.]

Attest:

....,

Secretary.

[*Form 60a consists of certificate of receipt of final application. Form 60b consists of affidavit of engineer on map of location. Form 60c consists of certificate of applicant on map of location. Form 60d consists of affidavit of engineer on notes of survey. Form 60e consists of certificate of applicant on notes of survey. Form 60f consists of affidavit of engineer on plans of structures. Form 60g consists of certificate of applicant on plans of structures. Form 60h consists of affidavit of engineer on estimates and data. Form 60i consists of certificate of applicant on estimates and data.*]

WATER-POWER STIPULATION.

Form 61.

United States Department of Agriculture,
Forest Service.

....., Water-power.
(Name of Forest.)

.....
(Name of applicant.)

.....
(Use applied for.)

.....
(Date of priority of application.)

Water-power Stipulation.

The ..... Company, hereinafter called the permittee, a corporation organized and existing under and by virtue of the laws of the State [or Territory] of ....., and having its office and prin-

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cipal place of business at ....., in the State [or Territory] of ....., having on the .... day of ....., 19.., filed with the District Forester at ....., an application, in accordance with the regulations of the Secretary of Agriculture, for a permit to occupy and use certain lands of the United States within the ..... National Forest in the State [or Territory] of ....., and more particularly described in and shown by the maps and plans accompanying said application and made a part thereof, upon which to construct, maintain, and operate certain works described in said application for the purpose of storing, conducting, and, or, using water for generating electric energy, and for the purpose of transmitting said energy, does hereby, in consideration of and as a prerequisite to the approval of the said application and the granting of the permit applied for, stipulate and agree as follows, to wit:

1. To construct its works on the locations shown upon the maps and in accordance with the plans specifically described in its final application for a permit, filed with the District Forester at ....., on the .... day of ....., 19.., which said maps and plans are hereby made a part of this stipulation, and to make no material deviation from said locations or from said plans unless and until maps or plans showing such deviation shall have been filed with the District Forester and approved by the Secretary of Agriculture.

2. To file, within six (6) months after the completion of each part of the works as required in Clause 4 hereof, in the manner prescribed for original maps of location, maps showing the final location of such part of the works as constructed, if such final location varies from that shown upon maps originally filed or upon approved amendments thereof; and to file also within six (6) months of the completion of each part of the works as aforesaid, in such manner as may be prescribed by the Secretary of Agriculture, detailed working plans of each part of the works as constructed, except of such parts as have been constructed in compliance with the plans originally filed or approved amendments thereof.

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3. [1] To begin the construction of the aforesaid works within the period of ..... months from the date of the permit for which application has been made, and to secure which this stipulation is filed with the District Forester, and thereafter to diligently and continuously prosecute such construction unless such construction is temporarily interrupted by climatic conditions or by some special or peculiar cause beyond the control of the permittee.

3. [1] To begin the construction of the following several parts of the aforesaid works within the several periods in this clause provided, which periods shall begin on the date of the permit for which application has been made, and to secure which this stipulation is filed with the District Forester, and thereafter to diligently and continuously prosecute such construction, unless such construction is temporarily interrupted by climatic conditions or by some special or peculiar cause beyond the control of the permittee:

(1) Within ..... months, Project A, consisting of .....

4. [1] To complete the construction and begin the operation of the aforesaid works within a period of ..... months from the date of the permit for which application has been made and to secure which this stipulation is filed with the District Forester.

4. [1] To complete the construction and begin the operation of the following several parts of the aforesaid works within the several periods in this clause provided, which periods shall begin on the date of the permit for which application has been made and to secure which this stipulation is filed with the District Forester:

(1) Within ..... months, Project A, consisting of .....

5. That it is understood that the term "construction of the works," as used in this stipulation, shall be deemed and taken to mean only the actual construction of dams, conduits, power-houses, transmission lines, or some permanent structure necessary to the operation of the completed works; and shall not include surveys, or the building of roads or trails, or the clearing of lands, or the

[1] Use the first form of Clauses 3 and 4 when but one complete project is to be constructed and it is inadvisable to separate it into two or more units of construction. When several distinct projects are involved, or where it may be desirable to divide a single project into two or more units of construction, use the second form of Clauses 3 and 4. Cancel out form not used.

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performance of any work preliminary to the actual construction of the permanent works.

6. That it is understood that if at the date of the termination of any one of the periods specified in Clause 3 hereof, unless such period is extended by the written approval of the Secretary of Agriculture after a showing by the permittee satisfactory to the Secretary of Agriculture, that such beginning of construction of that part of the works required to have been begun within such period has been prevented by the act of God or the public enemy, or by engineering difficulties that could not reasonably have been foreseen, or by other special and peculiar cause beyond the control of the permittee, thereupon the permission to occupy and use the lands of the United States within a National Forest for all parts of said works, the construction of which has not been begun on said date, shall terminate and become void, and that the water-power permit, in so far as such parts of said works are concerned, shall become of no effect.

7. That it is understood that the periods specified in Clause 4 hereof for the completion of construction and the beginning of operation of the several parts of the works will be extended only upon the written approval of the Secretary of Agriculture after a showing by the permittee, satisfactory to the Secretary of Agriculture that the completion of construction and beginning of operation has been prevented by the act of God, or the public enemy, or by engineering difficulties that could not reasonably have been foreseen, or by other special and peculiar cause beyond the control of the permittee; and, if such extension be not approved, that thereupon the permission to occupy and use the lands of the United States within a National Forest for such parts of said works shall terminate and become void; and that the water-power permit, in so far only as such parts of said works are concerned, shall become of no effect.

8. That, except when prevented by the act of God, or by the public enemy, or by unavoidable accidents or contingencies, the permittee will, after the beginning of operation, continuously operate for the generation of electric energy the works constructed, maintained and, or, operated, in whole or in part, under the aforesaid permit: *unless* upon a full and satisfactory showing of the reasons therefor this requirement shall be temporarily waived by the written consent of the Secretary of Agriculture.

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9. That any approval by the Secretary of Agriculture of any alteration or amendment, as hereinbefore provided, of any map or plan, or of any extension of time, shall affect only the matter specifically covered by such approval; and that no approval of any such alteration, amendment, or extension shall operate to alter or amend, or in any way whatsoever be a waiver of any other part, condition, or provision of this stipulation.

10. To pay annually in advance from the 1st day of January, 19.., to the ..... National Bank of ..... (United States depositary), or such other government depositary or officer as may be hereafter legally designated, to be placed to the credit of the United States, a charge for the occupancy and use of the lands described and shown upon the maps hereinbefore referred to, which charge shall be based upon the value for power purposes of the lands of the United States, permission for the occupancy and use of which has been applied for, or will hereafter be applied for; and the measure of said value for said power purposes shall be deemed and taken to be the net power capacity of the works constructed, maintained, and, or, operated under said permit, as said net power capacity is hereinafter fixed or determined in Clause 12: *It being understood* that the term "gross power capacity," as used in this stipulation, shall be deemed and taken to mean the power capacity of the entire works to be constructed, maintained, and, or, operated in whole or in part under the permit for which application is made: *Provided,* that the term "power capacity," as used in this stipulation, shall be deemed and taken to mean estimated average annual station output in electrical horse-power, which under continuous operation with reasonable load factor is possible of development from all water available therefor falling through effective head, with deductions for reasonable mechanical and electrical losses in generating machinery, and that the term "load factor," as used in this stipulation, shall be deemed and taken to mean ratio of average output to maximum output; that the term "net power capacity," as used in this stipulation, shall be deemed and taken to mean the gross power capacity, as above defined, less the deductions hereinafter specifically set forth.

11. That the gross power capacity of the entire works to be constructed, maintained, and, or, operated, in whole or in part, under the aforesaid permit shall, for the purposes of this stipulation be deemed and taken to be ..... electrical horse-power, of which

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amount the storage power of the reservoir or reservoirs, to be constructed, maintained, and, or, operated, in whole or in part, under said permit shall, for the purpose of this stipulation, be deemed and taken to be ..... electrical horse-power: *It being understood* that the term "storage power" as used in this stipulation shall be deemed and taken to mean that part of the aforesaid gross power capacity which is made possible of development by the use of the aforesaid reservoir or reservoirs: *It being further understood* that if any alterations or amendments of the maps of location or plans of structures, as provided for in clauses 1 and 2 hereof, shall cause an increase or a decrease of the gross power capacity or of the storage power as hereinbefore taken, said increased or decreased gross power capacity and storage power shall, from the beginning of the calendar year next succeeding the date of the approval of said alterations or amendments, be deemed and taken to be, for the purposes of this stipulation, the gross power capacity of the works and the storage power of the reservoir or reservoirs, to be constructed, maintained, and, or, operated under said permit; and, *it being further understood* that if at any time not less than ten (10) years after the original or after the last preceding determination of the said gross power capacity, either the permittee or the Secretary of Agriculture, on the ground of the inaccuracy, insufficiency, or inapplicability of the data upon which said original or said last preceding determination of the said gross power capacity was made, shall apply for or give notice of review of said original or said last preceding determination, then and thereupon such review shall be taken by the said Secretary and a redetermination of the gross power capacity and of the storage power shall be made; and the said redetermined gross power capacity and the said redetermined storage power shall for the purpose of this stipulation, and from the beginning of the next calendar year, be deemed and taken to be the gross power capacity of the works and the storage power of the reservoir or reservoirs, constructed, maintained, and, or, operated, in whole or in part, under said permit.

12. That it is understood that in order to determine the net power capacity upon which the aforesaid charge shall be calculated, deductions from the gross power capacity as hereinbefore taken or determined will be made as follows:

(a) An amount bearing approximately the same ratio to the storage power of the reservoir or reservoirs, to be constructed,

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maintained, and, or, operated under the aforesaid permit, as the area of unreserved lands and patented lands within the flood lines of such reservoir or reservoirs bears to the total area within said flood lines, as of the beginning of each year; *It being understood* that the term "unreserved lands," as used in this stipulation, shall be deemed and taken to mean lands of the United States not reserved as a part of any National Forest, and that this stipulation shall not affect such lands or restrict in any manner the right and duty of the United States to control the occupancy and use thereof through the department or office lawfully charged with their custody or control; and *It being further understood* that the term "patented lands," as used in this stipulation, shall include all lands to which title has been perfected in persons, corporations, States, and Territories; also all lands outside the United States.

(b) An amount bearing approximately the same ratio to the difference between the aforesaid gross power capacity and the aforesaid storage power as the length of the conduit or conduits to be constructed, maintained, and, or, operated, under said permit, upon unreserved lands and upon patented lands, bears to the total length, from intake to power-house, of the said conduit or conduits, as of the beginning of each year; *It being understood* that the word "conduit," as used in this stipulation, shall include ditches, canals, flumes, pipe-lines, and all other means for the conveyance of a flow of water.

(c) From the gross power capacity remaining after the said deductions *(a)* and *(b)* have been made will be made a further deduction, which deduction, in per cent, will be calculated by multiplying the square of the distance of primary transmission in miles by the constant factor 0.001; *It being understood* that in no case will deduction *(c)* exceed twenty-five (25) per cent, and that the net power capacity resulting from said deductions from the aforesaid gross power capacity shall be deemed and taken to be, as of the beginning of each year, the net power capacity upon which the aforesaid charge shall be calculated.

13. That it is understood that if any part of the electric energy generated by the works constructed either in whole or in part under the aforesaid permit is used by the permittee itself in the operation of its own mines or in the milling or reduction of ores therefrom, or as auxiliary to irrigation works owned and operated by the permittee, or for such other miscellaneous uses as may be determined

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by the Secretary of Agriculture to fall within "noncommercial" use, the aforesaid net power capacity upon which the aforesaid charge for any year is to be calculated shall, before such calculation, be reduced by an amount bearing approximately the same ratio to the aforesaid net power capacity as the amount of electric energy generated by the said works and used for the purposes in this clause above named during the last preceding year bears to the total amount of energy generated by the said works during the said last preceding year.

14. That the rates at which the aforesaid charge shall be calculated shall be the following amounts per net electrical horse-power per annum:

For the first year	$0.10
For the second year	0.20
For the third year	0.30
For the fourth year	0.40
For the fifth year	0.50
For the sixth year	0.60
For the seventh year	0.70
For the eighth year	0.80
For the ninth year	0.90
For the tenth and each succeeding year	1.00

15. That it is understood that if the permittee completes the construction and begins the operation of the several parts of the aforesaid works within the periods provided for in Clause 4 hereof, or any approved extensions thereof, thereupon all charges for the occupancy and use of the lands for the said works so completed and operated which may have been paid prior to the date of the termination of such periods, or any extensions thereof, will be credited to the permittee and will be applied to the payment of charges due at the termination of such periods or any extensions thereof, or to become due thereafter, and the rate of ten (10) cents per net electrical horse-power per annum will apply from the date of the termination of the period or periods for the completion of construction and the beginning of operation specified in Clause 4 of this stipulation, or any approved extension thereof, and shall increase by ten (10) cents per net electrical horse-power per annum for each year thereafter until a rate of one dollar ($1.00) per net electrical horse-power per annum is reached, and will then

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remain at the rate of one dollar ($1.00) per net electrical horsepower per annum until the expiration of the aforesaid permit.

16. That it is understood that if any part of the aforesaid charge, payable as hereinbefore provided, shall, after due notice has been given, be in arrears for six (6) months, then and thereupon the said permit to occupy and use the lands of the United States covered by said permit within a National Forest shall terminate and be void.

17. That the decision of the Secretary of Agriculture shall be final as to all matters of fact upon which the gross power capacity of the works and the storage power of the reservoir or reservoirs, constructed or to be constructed, maintained and, or, operated, in whole or in part, under the aforesaid permit, and the net power capacity of the aforesaid works for any year, depend.

18. To install and maintain in good operating condition, free of all expense to the United States, accurate measuring weirs, gauges, and, or, other devices approved by the Secretary of Agriculture or his authorized representative, adequate for the determination of the natural flow of the stream or streams from which water is diverted for the operation of said works, and of the amount of water used from the natural flow in the operation of said works, and of the amounts of water held in and drawn from storage, and to keep accurate and sufficient records, to the satisfaction of the Secretary of Agriculture, or his authorized representative, of the above-named measurements.

19. That the books and records of the permittee, in so far as they show the amount of electric energy generated by the works constructed, maintained, and, or, operated, in whole or in part, under the aforesaid permit, or the amounts of water held in or used from storage, or the stream flow, or any other data of the watershed furnishing the water used in the generation of said energy, shall be open at all times to the inspection and examination of the Secretary of Agriculture, or his duly authorized representative, and the permittee will, during January of each year, unless the time thereof is extended by the written consent of the Secretary of Agriculture, make a return to said Secretary, certified under oath, in such form as may be prescribed by the said Secretary, of such of the records of measurements made by or in the possession of the permittee, as may be required by the said Secretary, concerning the matters in

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this clause above named, and for the year ending on December 31st preceding.

20. That the works constructed, or to be constructed, maintained, and, or, operated under the aforesaid permit, will not be owned, leased, trusteed, possessed, or controlled by any device, permanently, temporarily, directly or indirectly, tacitly, or in any manner whatsoever, so that they form a part of, or in any way effect, any combination, or are in any wise controlled by any combination, in the form of an unlawful trust, or form the subject of any contract or conspiracy to limit the output of electric energy, or in restraint of trade with foreign nations or between two or more States or Territories or within any one State or Territory in the generation, sale, or distribution of electric energy.

21. That the aforesaid permit shall be subject to all prior valid claims and permits which are not subject to the occupancy and use authorized by said permit.

22. To protect all Forest Service and other telephone lines at crossings of and at all places of proximity to the transmission line in a standard manner and satisfactory to the Forest officers, and to maintain the line in such a manner as to prevent injury to stock grazing on the Forest.

23. To clear and keep clear the land along the transmission line for such width and in such manner as the Forest officers may direct.

24. To dispose of all brush and other refuse resulting from the necessary clearing of or cutting of timber on the lands occupied and, or, used under the permission applied for, as may be required by the Forest officer in charge.

25. To build and repair roads and trails as required by the Forest officer, or other duly authorized officer or agent of the United States, whenever any roads or trails are destroyed or injured by the construction work or flooding under the permission applied for, and to build and maintain suitable crossings as required by the Forest officer, or other duly authorized officer or agent of the United States, for all roads and trails which intersect the conduit, if any, constructed, maintained, and, or, operated on the lands the occupancy and use of which have been applied for and to secure which this stipulation is filed with the District Forester.

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26. To pay in advance, as required by the District Forester, to the United States depositary or officer, as above set forth in Clause 10 hereof, to be placed to the credit of the United States, the full value of all merchantable, live and dead timber cut, injured, or destroyed in the construction of said works, title to which at the time of said cutting, injury, or destruction is in the United States; such full value to be deemed and taken to be the amount of timber fixed by the District Forester according to the scale, count, or estimate of the Forest officer or other agent of the United States, in charge of said scale, count, or estimate, at a price which shall be the prevailing stumpage price for similar material on the said National Forest at the time of said cutting, injury, or destruction.

27. To pay, on demand of the District Forester, or other duly authorized officer or agent of the United States, to the United States depositary or officer, as above set forth in Clause 10 hereof, to be placed to the credit of the United States, full value as fixed by such District Forester or other duly authorized officer or agent, for all damage to the National Forests resulting from the breaking of, or the overflowing, leaking, or seeping of water from the works constructed, maintained, and, or, operated under the permission applied for, and for all other damage to the National Forests caused by the neglect of the permittee or that of its employees, contractors, or employees of contractors.

28. To sell electric energy to the United States, when requested, at as low a rate as is given to any other purchaser for a like use at the same time: *Provided,* that the permittee can furnish the same to the United States without diminishing the measured quantity of energy sold before such request to any other consumer by a binding contract of sale: *And provided further,* that nothing in this clause shall be construed to require the permittee to increase its permanent works or to install additional generating machinery.

29. To do all reasonably within its power and to require of its employees, contractors, and employees of contractors to do all reasonably within their power, both independently and upon the request of the Forest officers, to prevent and suppress forest fires upon and near the lands to be occupied under permit.

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In witness whereof the permittee has executed this stipulation on the .... day of ....., 19...

[Seal] .....,

By .....

Attest:

.....,

Secretary.

Acknowledgment.

State of .....,

County of .....,—ss.

On this .... day of ....., 19.., before me, a notary public in and for said county, duly commissioned and sworn, my commission expiring ....., 19.., personally came ....., to me personally known, who being by me duly sworn, did depose and say that he resides in .....; that he is the ..... of the ..... Company; that said company is the corporation which is described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to such instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and the said ..... acknowledged said instrument to be the free act and deed of said corporation.

Witness my hand and official seal the day and year first above written.

[Notarial Seal.] .....,

Notary Public.

[*Form 61a consists of District Forester's certification of receipt of stipulation.*]

[Forest Service Water-power Forms]

FINAL WATER-POWER PERMIT.

Form 62.

United States Department of Agriculture,
Office of the Secretary.

....., Water-power.
(Name of Forest.)

.....
(Name of applicant.)

.....
(Use applied for.)

.....
(Date of priority of application.)

Final Water-power Permit.

Whereas the ..... Company, hereinafter called the permittee, by authority of a resolution of its board of directors, adopted on the .... day of ....., 19.., filed with the District Forester at ....., on the .... day of ....., 19.., in accordance with the regulations of the Secretary of Agriculture under the act of February 15, 1901, an application for permission to occupy and use, for the generation, distribution, and transmission of electric energy certain lands of the United States within the ..... National Forest, in the State [or Territory] of ....., and more particularly described and shown by the maps, field-notes, plans, estimates and data accompanying the said application;

Whereas the aforesaid maps and plans, as hereinafter specifically set forth, have been adopted by the permittee as the maps of the approximate final location and as the approximate plans of the works which the permittee proposes to construct under this permit; and

Whereas the permittee has paid to the ..... National Bank of ..... (United States depositary), to be placed to the credit of the United States, the sum of ..... dollars ($.....); and

Whereas the permittee, on the .... day of ....., 19.., executed, and on the .... day of ....., 19.., filed with the District Forester at ..... a stipulation required by the Secretary of Agriculture as a condition to the issuance of this permit;

Now, therefore, I, ..., Secretary of Agriculture of the United States, in accordance with the authority conferred

[Forest Service Water-power Forms]

upon me by the act of February 15, 1901, do authorize the permittee to occupy and use the lands hereinbefore referred to, subject to the regulations of the Secretary of Agriculture and to the provisions hereinafter set forth, for the construction, maintenance, and, or, operation thereon, for the purposes in Clause 1 below set forth, of the following works:

[Cancel such of the four following items *(a)*, *(b)*, *(c)*, and *(d)* as may not be applicable.]

(a) ..... dams approximately
(Masonry, earth, etc., diverting or storage.)
..... feet in maximum height, and approximately ..... feet in maximum length, to occupy approximately ..... acres, respectively, and to form ..... reservoirs to flood approximately ..... acres at extreme flood level and approximately ..... acres at spillway level, respectively;[1] in section ....., township ....., range ....., ... meridian, of which total of ..... acres approximately ..... acres are National Forest land; said dams and said reservoirs being designated respectively as follows: .....

(b) ..... conduits, approximately ..... miles in length, respectively,[1] crossing sections ....., township ....., range ....., ... meridian, of which total of ..... miles, approximately ..... miles will lie upon National Forest land; said conduits being designated, respectively, as follows: .....

(c) ..... power-houses and appurtenant structures to occupy approximately ..... acres, respectively,[1] in section ....., township ....., range ....., ... meridian, of which total of ..... acres approximately ..... acres are National Forest land; said power-houses being designated, respectively, as follows: .....

(d) ..... transmission lines ..... miles in length, respectively,[1] crossing section ....., township ....., range ....., ... meridian, of which total of ..... miles approximately ..... miles will cross National Forest land; said transmission lines being designated, respectively, as follows: .....

All as approximately shown upon certain maps and plans, executed by ....., on the .... day of ....., 19.., and designated as follows: ..... [Designate each original of map or plan as

[1] If land is unsurveyed, substitute for the description by legal subdivisions in paragraphs (*a*), (*b*), (*c*), and (*d*) the following: "Located on certain lands described and shown by the maps and field-notes accompanying the application filed with the District Forester on the .... day of ....., 19.."

[Forest Service Water-power Forms]

"Exhibit A," "Exhibit B," etc., following each such designation by the title of the map or plan, as "Exhibit A," Map of Location of, etc.; "Exhibit ....," Plan of, etc.], which maps and plans are hereby made a part of this permit.

Clause 1. The works to be constructed and, or, operated under this permit shall be constructed, maintained, and, or, operated for the purpose of storing, conducting, and, or, using water for the generation of electric energy and for the purpose of the transmission of said energy.

Clause 2. Unless sooner revoked by the Secretary of Agriculture, this permit shall terminate and become void at the expiration of fifty (50) years from the date hereof, and at said expiration may be deemed to be an application by the permittee for a new permit to occupy and use such lands as are occupied and used under this permit: *Provided*, that the permittee shall, not less than two or more than four years prior to the termination of said fifty (50) years, formally notify the Secretary of Agriculture that it desires such new permit, and shall comply with all laws and regulations at such time existing regulating the occupancy and use for water-power purpose of lands of the United States within National Forests.

Clause 3. Upon the presentation to the Secretary of Agriculture of certified copies of sale, lease, assignment, execution of judgment, or other form of transfer of the properties or other rights of the permittee in and to the works constructed under this permit and of the water or other rights necessary to the enjoyment of the use of the said works, the said Secretary may, in his discretion, upon the formal surrender of this permit, and the filing of a stipulation satisfactory to the said Secretary by the purchasers, transferees, executors, successors, lessees, or assigns of the permittee, issue a new permit to such purchasers, transferees, executors, successors, lessees, or assigns, authorizing him, it, or them to occupy and use the aforesaid lands of the United States for the purposes specified in this permit and in the stipulation to be filed as aforesaid, and for the unexpired term of this permit.

Clause 4. The works constructed under this permit, excepting reservoirs, dams, and operating mechanism, and conduits and operating mechanism, may be removed by the permittee at any time during the life of this permit, and may be removed by the per-

[Forest Service Water-power Forms]

mittee, or by its successors in interest under Clause 3 hereof, after the termination of the permit if within one year of the date of said termination notice in writing of intention to remove within a reasonable time is filed with the Forest Supervisor.

Clause 5. This permit is nontransferable.

In witness whereof I have hereunto set my name this .... day of ....., 19..

....,
Secretary of Agriculture.

TRANSMISSION LINE PERMIT.

Form 63.

United States Department of Agriculture,
Forest Service.

..... Water-power.
(Name of Forest.)

.....
(Name of applicant.)

Transmission Line. .....
(Date of application.)

Transmission Line Permit.

This transmission line permit issued this .... day of ....., 19.., to the ..... Company, hereinafter called the permittee, a corporation organized and existing under and by virtue of the laws of the State [or Territory] of ....., and having its office and principal place of business at ....., in the State [or Territory] of ....., witnesseth that,

Whereas, the permittee filed with the Supervisor of the ..... National Forest at ..... on the .... day of ....., 19.., an application for permission to occupy and use certain lands of the United States within the ..... National Forest, in the State [or Territory] of .....;

And whereas, the permittee on the .... day of ....., 19.., paid to the ..... National Bank of ..... (United States depositary), to be placed to the credit of the United States, the

[Forest Service Water-power Forms]

sum of ..... dollars ($.....) as one year's charge in advance from the date of the issuance of this permit:

Now, therefore, the conditions of this permit are as follows:

Clause 1. Permission is hereby granted to the permittee to construct and maintain a transmission line ..... miles in length, within the boundaries of the ..... National Forest, and crossing section ....., township ....., range ....., meridian ....., whereof approximately ..... miles will cross National Forest land, such location being as shown on a certain tracing accompanying the application for this permit, which tracing was executed by ..... on the .... day of ....., 19.., and which tracing is hereby made a part of this permit; and said permission being subject to all regulations of the Secretary of Agriculture governing National Forests and to the specific provisions and considerations hereinafter set forth.

Clause 2. The permittee shall pay to the ..... National Bank of .....: (United States depositary) or such other government depositary or officer as may hereafter be legally designated, to be placed to the credit of the United States, a charge annually in advance from January 1, 19.., of ..... dollars ($....), being at the approximate rate of five dollars ($5.00) per mile per annum.

Clause 3. If any part of the aforesaid charge, payable as aforesaid, shall, after due notice has been given, be in arrears for six (6) months, then and thereupon this permit shall terminate and become void and be of no effect.

Clause 4. The permittee shall pay in advance, as required by the District Forester, to the United States depositary or officer as aforesaid, to be placed to the credit of the United States, the full value of all merchantable, live and dead timber cut, injured, or destroyed in the construction of said transmission line, title to which, at the time of said cutting, injury, or destruction, is in the United States; such full value to be deemed and taken to be the amount of timber fixed by the District Forester according to the scale, count, or estimate of the Forest officer or other agent of the United States in charge of said scale, count, or estimate, at a price which shall be the prevailing stumpage price for similar material on the said National Forest at the time of said cutting, injury, or destruction.

[Forest Service Water-power Forms]

Clause 5. The permittee shall begin *bona fide* construction within ..... months and complete within ..... months from date of execution of this permit.

Clause 6. The permittee shall clear and keep clear the land along the transmission line for such width and in such manner as the Forest officers may direct.

Clause 7. The permittee shall protect all Forest Service and other telephone lines at crossings of and at all places of proximity to the transmission line in a standard manner and satisfactory to the Forest officers and shall maintain the line in such manner as to prevent injury to stock-grazing in the Forest.

Clause 8. The permittee shall do all reasonably within its power, and require of its employees, contractors, and employees of contractors to do all reasonably within their power, both independently and upon the request of the Forest officers, to prevent and suppress forest fires upon and near the lands to be occupied under permit.

Clause 9. This permit is nontransferable and is subject to all prior valid claims or permits which are not subject to the occupancy hereby permitted.

In witness whereof I have hereunto set my hand this ..... day of ....., 19...

.....,
District Forester.

(3d ed.)

§ 1460. CALIFORNIA FORMS.

(1911.)

No special forms are prescribed in California. Any arrangement containing the statements required by section 1415 of the Civil Code is a sufficient notice of appropriation.

The following notice was upheld in Vineland Irr. Dist: v. Azusa Irr. Co., 126 Cal. 482, where it was relied on by appropriators claiming an appropriation of both surface and underground water.

The law of prior appropriation is applicable only to waters on public land, in California.

Notice of Appropriation of Water.

Notice.

Azusa, August 27, 1883.

To Whom It May Concern:

We, the undersigned, hereby claim the water here flowing in the channel of the San Gabriel River, to the extent of 5,000 inches measured under a four-inch pressure, and the purpose for which the same is claimed is for irrigation and domestic use on lands in Azusa Township and the County of Los Angeles, State of California, and owned by the stockholders of the Azusa Water Development and Irrigating Company.

The means by which it is intended to divert said water is by bedrock and surface dam, or both, tunnel, ditch, iron pipe, and flume, or any or either of such means as may be found most practicable, and the size of such tunnel will be six feet in height and six feet in width, and the size of such ditch to be eight feet in width and five feet in depth. The size of such iron pipe to be forty inches in diameter, and the size of such flume is six feet six inches in width, and six feet and six inches in depth, or larger, if necessary, to carry the amount of water here claimed.

Such bedrock and surface dam, or either of them, to be constructed of rock, cement, logs, brush, and gravel, or either of them, or any of such material, or any other material found as well or better suited for the purpose of such construction.

AZUSA WATER DEVELOPMENT AND IRRIGATING COMPANY.

By M. BALDRIDGE,

Pres.

This notice was attacked on the ground that it did not give the place where the same was or was to be posted; but, as the notice was posted at the point which afterward became the mouth of the development tunnel, and specified the water "here flowing," the notice was held valid.

Notice of Appropriation of Water.

Another notice appearing in the reports is the following in De Wolfskill v. Smith, 5 Cal. App. 175, at 178.

Notice of Appropriation of Water.

Take notice that the undersigned claims fifteen hundred inches of water measured under a four-inch pressure flowing from and at the wells bored by the San Jacinto Oil Company on the land which would be the northwest quarter of section four, township three south, range two west, San Bernardino meridian, if said land were surveyed by the United States, and I intend to divert said water at the three several points where this notice is posted, to wit, at each of said wells bored by the San Jacinto Oil Co.

I intend to use said water for domestic and irrigation purposes on the land which was known as the Rancho San Jacinto Nuevo and the Moreno, Lakeview and Alessandro Colonies and adjoining lands in the county of Riverside, State of California.

I intend to divert said water by means of ditches of sufficient capacity to carry the same, leading from each of said points.

Dated the thirteenth day of October, 1902.

ELENA P. DE WOLFSKILL.

Witness:

DAVID G. WOLFSKILL.

(3d ed.)

§ 1461. COLORADO FORMS.

(1911.)

State Engineer's circular.
Form of title of map.
Statement for ditch.
Filings for pipe-lines.
Filings for seepage ditches.
Statement for reservoir.
Forms of certificates.
Engineer's affidavit.
Changes, enlargements and extensions.
Amended filings.
Temporary filings.
Construction plans.
Fee list.
Certificates formerly placed upon filings.

State Engineer's Circular.—*(Effective on and after August 5, 1911.)*

No filings will be accepted by this office unless absolutely complying with these requirements.

[No printed blanks are issued.—THE AUTHOR.]

Requirements for filing claims to water-rights in compliance with the law of 1911, and the Regulations of the State Engineer's office thereunder. This act provides that

"Every person, association or corporation hereafter constructing or enlarging any reservoir or reservoirs, constructing, changing the location of, or enlarging any ditch, canal, or feeder for any ditch or reservoir, for the purpose of furnishing a supply of water for domestic, irrigation, power, or storage, or for any other beneficial use, taking water from any natural stream, shall within sixty days after the commencement of such construction, change of location or enlargement, make a filing in the office of the State Engineer for each specific claim in such form as shall seem sufficient and satisfactory to the State Engineer, and accompanied by the proper fees, as provided by statute, of a map on tracing cloth. . . . ."

The map must be accompanied by the proper fees and filed in the office of the State Engineer within sixty days of the commencement of work, which time may be the date of beginning of actual construction or the beginning of the survey.

Maps must be on good quality of tracing cloth, 24x36 inches, with a two-inch margin on the left end, and one-half inch on other three sides, making the available space for the map 23x 33½ inches. All maps must be made of this size irrespective of the size of the reservoir or the ditch to be shown.

Trim all sheets to 24x36 or same will be returned.

The scale of the map may correspondingly vary, but should be sufficient to clearly show each course and distance. It is desirable in the case of reservoirs, that the scale should be four hundred feet to the inch, or larger when needed to properly show the proposed works. In case the sheet is not sufficient size for this purpose, the map may consist of two or more sheets. In such case, each sheet should

be marked "Sheet No. 1 of ..... sheets," "Sheet No. 2 of ..... sheets," etc., and each sheet properly titled.

The ink used in making these maps must be *water-proof* for permanent record. Signatures and dates must also be in *water-proof* ink.

All statements are to be placed upon the same sheet or sheets as the map.

It is compulsory to use the forms of statements and affidavits as given herein. It will save time and delays.

A person may sign statements as agent for others, and the authority for so doing shall be a power of attorney duly executed and recorded in the office of the county clerk and recorder, in the county where the project is located, and must accompany the map but not be attached thereto.

The impression of the notarial seal must be placed upon and indented into the tracing cloth and not upon a wafer attached to the map.

Positively no maps will be received which have been folded or creased in any place. Maps should be rolled on a stick or placed in a pasteboard case for shipment.

When a ditch or reservoir derives its supply of water through another ditch the name of the natural stream from which the water is first taken should always be given as the source of supply.

All statements must be signed by the claimant or claimants.

When the claimant is a corporation the name of the company should be subscribed by ..... [official title] attested by secretary, and the corporate seal impressed.

Form of Title.

Map of the

..... [Ditch or] Reservoir. ..... County, Colorado. Irrigation Division No. ....., Water District No. ..... Courses Referred to (True Mer., Mag. M., Public Land Survey).

Scale ..... in. = ... ft.

A ditch or reservoir is in the water district in which its source or supply is located, and must be so given on the map.

Form of Statement for Ditch.

Know all men by these presents: That the undersigned ....., claimant, whose postoffice address is ....., ha.. caused to be located The ..... Ditch as hereinafter mentioned, ha.. made these several statements relative thereto, and filed the same in compliance with the laws of the State of Colorado. The accompanying map, which shows the location of said ditch, forms a part of this filing.

First. The headgate is located at a point on the ..... bank of [name of stream] ....., from which it derives its supply of water, whence the ..... corner of Section No. ....., Township

....., Range ..... of the ..... Principal Meridian bears [course and distance] .....

(In naming a source of supply for a ditch or reservoir, if a tributary, give the name of the main stream in statement.)

Second.

The depth of said ditch is ..... feet.

" width " " " " ..... " on the top.
" " " " " " ..... " on bottom.
" grade " " " " ..... " per 1,000 ft.
" length " " " " ..... "

Third. The carrying capacity of said ditch is ..... cubic feet per second of time, for which claim is hereby made for ..... purposes.

Fourth. The estimated cost is $.....

Fifth. Work was commenced by survey (or actual construction) on the .... day of ....., A. D. 19..

Sixth. Claimant's signature.

The map of the ditch should show the following:

First: The location of the headgate by course and distance to a corner of the public survey, or if upon unsurveyed lands, to two or more natural objects of permanent character.

Second: The general course of the stream should be shown and the name given.

Third: The route of the ditch by courses and distances.

Fourth: The 40-acre tracts and other subdivisions and patented lands through which the ditch passes, together with the ownership of all lands crossed by the ditch or canal.

Fifth: The north direction should be indicated by an arrow. Direction of flow of all streams shown on map should be indicated.

Sixth: Each map must plainly show township, range and meridian.

Filings for Pipe-line.

In making a filing for a pipe-line, the map should show the location of the pipe-line in the same manner as for ditches. The statement should give the diameter of the pipe, carrying capacity and the beneficial purpose for which the water is to be used. The general form of statement as given for ditches should be used.

Filings for Seepage Ditches.

In making a filing for a seepage ditch, the upper end of the ditch should be tied to a legal government land corner and the courses given as in the case of all other ditches. The statement should give the size, grade and carrying capacity of the ditch. The source of supply should be given as seepage. The general form of statement as given for other ditches should be used.

Form of Statement for Reservoir.

Know all men by these presents: That the undersigned ..... claimant, whose postoffice address is ....., ha.. caused to be located The ..... Reservoir, as hereinafter mentioned, ha.. made these several statements relative thereto, and filed the same in compliance with the laws of the State of Colorado. The accompanying map, which shows the location of said reservoir, forms a part of this filing.

First. Height of dam ..... feet.

[Note.—Height of dam is from the lowest point of the valley up to the highest point of dam.]

Second. The initial point of survey is located at a point whence the ..... corner of Sec. No. ....., T. ....., R. ..... of the ..... principal meridian bears [courses and distances] ..... [Do not make tie to any corner lying within the high-water line of the reservoir.]

Third. The following table gives the areas and capacities for each foot in depth from the bottom of the outlet tube up to and including the high-water line.

Depth in feet from Bottom of Outlet.....		Area in sq. ft.	Capacity in cu. ft.
	0 ft.	.....	.....
	1 ft.	.....	.....
	2 ft.	.....	.....
	3 ft.	.....	.....
	4 ft.	.....	.....
	etc.	(High-water line.)	

Fourth. The total capacity of said reservoir is ..... cubic feet of water, for which claim is hereby made for ..... purposes.

Fifth. The source of supply for said reservoir is [name of stream] .....

Sixth. The estimated cost is $.....

Seventh. Work was commenced by ..... on the ....., A. D. 19...

Eighth. Claimant's signature.

A specific claim shall be made in each statement for each reservoir and each ditch, and from each separate source of supply.

The map of reservoir should show the following:

First. The location of the initial point of survey by course and distance to a corner of the public survey, or to two or more natural objects if upon unsurveyed land. The initial point of survey should preferably be at one end of the proposed dam.

Second. The high-water line of the reservoir by courses and distances, the location of the dam and approximate contours at five-foot intervals.

Third. The stream upon which the reservoir is located should be shown on the map and its name given.

Fourth. Ditches to and from a reservoir, name, courses and distances, with grade, section of water prism and capacity in cubic feet must be shown in like manner as for a ditch filing, and where a natural stream is used for the outlet, the ditch must be shown from the point of diversion to the land to be irrigated.

Fifth. The 40-acre tracts and other subdivisions and patented lands, together with the ownership of the land on which the reservoir is located, or through which the inlet and outlet ditches pass.

Sixth. The north direction should be indicated by an arrow.

Forms for State Engineer's Certificates.

The following form of certificate is to be placed on each sheet of the filing near the lower right corner of the tracing:

"Accepted for filing in the office of the State Engineer of Colorado on the .... day of ....., A. D. 19...

....., State Engineer.

By ....., Deputy."

Form of the Engineer's Affidavit.

State of Colorado,
County of .....,—ss.

....., being duly sworn, on his oath deposes and says that he is the engineer of the ..... Ditch [or Reservoir], that the survey of the same and the map thereof were made by him [or that such map was made under his instructions], and that such survey is accurately represented upon this map; that he has read the statements thereon, and that the same are true of his own knowledge.

....., Engineer [or Surveyor].

Subscribed and sworn to before me this .... day of ....., A. D. 19..

My commission expires .....

[Seal.] ....., Notary Public.

Changes, Enlargements or Extensions.

In case of changes, enlargements or extensions of any ditch, the map must show the change, part enlarged or the extension. The statement must give the depth, width, grade, length and carrying capacity of the ditch before enlargement and the same data after enlargement. The time of commencement of the work on the enlargement and the same data after enlargement. The time of commencement of work on the enlargement and the estimated cost should be given.

In case of changes or enlargements of reservoirs the map must show the high-water line, by courses and distances of the original reservoir and the high-water line, by courses and distances, of the reservoir as enlarged or changed.

The statement should give the original capacity and the capacity after enlargement, date of commencement of work on the enlargement and estimated cost.

Amended Filings.

Whenever it is desired to amend a filing, after same has been approved by the State Engineer, it will be necessary to file a new map and statement on tracing cloth of the regulation size. The amended filing should show the original map and should give the original statement and all amendments thereto.

Temporary Filings.

The following is a quotation from the statute permitting temporary filings: "Whenever, through the necessity for extended surveys requiring long periods of time it shall be impracticable for the claimant or claimants to file a complete map or statement within sixty days, as required above, a map and statement as complete as can be prepared within sixty days shall be filed, with a further statement that a complete map and statement will be filed later, and upon the completion of such survey a full and detailed map and statement amending those first filed shall be offered for examination and acceptance in the same manner as herein provided for the original filing." The reason for filing a preliminary map should be covered by the statement.

For an enterprise such that it is impossible to make complete surveys and maps within the sixty days required by law, as complete a map and statement as possible should be filed. The statement should be of the regular form with an additional clause stating the statutory reason for filing a temporary map, and that a further and complete map will be furnished for filing as soon as the same can be completed.

No temporary reservoir filing will be accepted unless the survey of the high-water line has been made and shown on the map, by courses and distances and unless, from the magnitude of the project, it is apparent that a complete filing could not be made within the sixty days required by law, and must show sixty days' actual work. The ownership of the forty-acre subdivisions must be shown.

All maps to be returned by mail must be accompanied by postage.

After a map has been accepted for filing a blue-print on cloth will be returned to the consignee. This blue-print must be filed within ninety (90) days after commencement of work, in the office of the county clerk of the county in which the proposed reservoir or headgate of the proposed ditch is located.

If demanded, a negative of the filing will be returned to the consignee with the blue-print.

If this negative is desired, *demand for it must be made* when the map is transmitted to this office.

Maps returned for correction are not entered as having been filed in this office.

No filing will be made until the maps are received in correct form and all fees payable in connection with it are paid.

Maps must be prepared in a neat and workmanlike manner and all lettering in connection with the map or statement must be neat, orderly and easily readable.

Construction Plans.

When filing construction plans for dams, use 24″x36″ tracing cloth with a two-inch margin on the left end and one-half inch on other three sides, making the available space for drawing 23″x33½″.

All of the general design and details must be shown. The following form of certificate is to be placed on each sheet of the plans near the lower right corner of the tracing:

"Approved on the .... day of ....., A. D. 19...

.....,
State Engineer."

Specifications in duplicate must accompany the above plans, and should be on letter size paper 8½x11, typewritten or printed, and so bound that they may be filed in a vertical file.

Specifications must not be rolled or folded.

Place same form of certificate on specifications as on plans.

Place appropriate titles on both plans and specifications.

Approved blue-print and set of specifications will be returned to consignee.

Fee List.—*(Stats. 1911, c. ——, Sen. Bill 537.)*

For the examination and filing of each map and statement describing a claim to a water-right, $10 if the amount of water claimed does not exceed twenty (20) cubic feet per second and an additional $1 for each cubic foot per second claimed in excess of twenty.

One claim consists of one ditch or one reservoir deriving its supply from one stream. Two claims will consist of two ditches or reservoirs deriving their supply of water from one source or one reservoir or one ditch deriving its supply of water from two different sources, etc.

For the examination and filing of each map and statement describing a claim to water for storage, $10 for each one thousand (1,000) acre-feet or fraction thereof of storage capacity claimed.

For filing each judicial decree ordering the transfer of a water-right or the change of a point of diversion, $2.00.

If more than one transfer is permitted in such decree, two dollars will be charged for each additional transfer.

For each certificate, other than those which may be required, in the case of original filings of claims to water-rights, requiring official signature and seal, $2.

For the examination and filing of each set of plans and specifications for a reservoir, dam, embankment or other structure for the purpose of storing or utilizing water, $1 for each $1,000 or fraction thereof of the estimated cost of such structure or structures.

For copies of maps, $1 for each hour or fraction thereof necessary for the making of such copies.

For each blue-print of a tracing forming a public record, $2.

A white print of a filing three (3) dollars for each sheet.

If a filing consists of two or more sheets each additional sheet will be $2.

For copies of records, twenty (20) cents per folio.

For rating any ditch, canal, reservoir inlet or outlet at the request of the owner or owners thereof or of any agent or employee having control of the same, $10 per day and actual expenses for each day actually and necessarily employed by the hydrographer in making such rating.

Personal checks will not be received in payment of fees by this office. Remittances should be by bank draft, postoffice, or express money order.

Certificates Formerly Placed upon Filings.—Under the old regulations the following certificates were inscribed by the State Engineer, but are now displaced by the form appearing on page 1607, *supra*. Although here reprinted for information, yet the following are no longer in force. [THE AUTHOR.]

Certificate on Map to be Filed With State Engineer.

State Engineer's Office.

Denver, Colorado.

I hereby certify that this map and statement has been examined and approved by me as agreeing with the statutes of the State of Colorado, and the regulations of this office, and was accepted for filing on the .... day of ....., A. D. 19..

....,
State Engineer.

By ....,
Deputy.

Certificate on Duplicate or the One to be Filed With County Clerk.

State Engineer's Office.

Denver, Colorado.

I hereby certify that this map and statement has been examined and approved by me and is a duplicate of the one filed in the office of the State Engineer on the .... day of....., A. D. 19..

....,
State Engineer.

By ....,
Deputy.

Certificate for Two or More Sheets—Sheet No. 1, to be Filed in the Office of the State Engineer.

State Engineer's Office.

Denver, Colorado.

I hereby certify that this map and statement, consisting of ..... sheets, identified and designated as sheets No. ...., No. ...., No. .... (etc.), respectively, has been examined and approved by me as agreeing with the statutes of the State of Colorado and the regulations of this office, and was accepted for filing on the ....day of ....., A. D. 19..

....,
State Engineer.

By ....,
Deputy.

Sheets No. 2, No. 3 (etc.), to be Filed With State Engineer.

State Engineer's Office.

Denver, Colorado.

I hereby certify that this is sheet No. .... of the ..... [name of filing], a filing consisting of ..... sheets, which was approved by me and filed in this office on the .... day of ....., A. D. 19..

....,
State Engineer.

By ....,
Deputy.

Duplicate of Sheet No. 1, to be Filed With County Clerk.

State Engineer's Office.

Denver, Colorado.

I hereby certify that this map and statement, consisting of ..... sheets identified and designated as sheet No. 1, No. 2, No. 3 (etc.), respectively, has been examined and approved by me and is a duplicate of the one filed in the office of the State Engineer on the .... day of ....., A. D. 19..

....,
State Engineer.

By ....,
Deputy.

[Printed blanks can be obtained from the State Engineer.]

(3d ed.)

§ 1462. IDAHO FORMS.

(1911.)

Application for permit to appropriate the public waters of the State of Idaho.

Notice of proof of completion of works.

Notice of proof of application of water to beneficial use.

Notice of publication.

Notice for publication—Notice of proof of application of water to beneficial use.

Notice of proof of completion of works and application of water to beneficial use.

Proof of completion of works—Deposition of holder.

Proof of completion of works—Deposition of witness.

Proof of application of water to beneficial use—Deposition of holder.

Proof of application of water to beneficial use—Deposition of witness.

Report of water commissioner.

Certificate of completion of works.

Water license.

(The following contains all forms used in connection with water appropriation in this State from the application for permit to the license which is granted after beneficial use proof is made.—THE AUTHOR.)

No. .....

Application for Permit to Appropriate the Public Waters of the State of Idaho.

1. Name of applicant ....
   Postoffice address: .....
   County ....., State .....

I. If applicant is a corporation, give:
   (a) Date and place of incorporation .....
   (b) The amount of capital stock .....
   (c) The amount paid in.....
   (d) The names and addresses of directors .....

II. The financial resources of the applicant are:
   (a) Cash on hand .....
   (b) Treasury stock ....
   (c) Bonds to be issued.....
   (d) Other resources..... ....

[Printed blanks can be obtained from the State Engineer.]

2. The quantity of water claimed is.....
cubic feet per second.
3. Source of water supply.....
County of.....
4. Location of point of diversion.....
5. To be used for:

I. Irrigation and domestic use:

(a) Amount of land to be irrigated ..... acres.
(b) In the following legal subdivisions.....

.....

(A list of all lands to be irrigated may be appended as a part of this application.)

II. Mining, power, manufacturing or transportation purposes:

(a) To be used for.....
(b) Amount of power to be generated.....
horse-power.
(c) At what point.....
(d) Is water to be returned to any stream.....
(e) If so, name stream and locate point of return ....

.....

6. Estimated cost of works.....
7. Description of works for diversion.....

I. Kind of works.....
(Reservoir, dam, ditch, flume, pipes or otherwise)

II. Dimension of works:

(a) Height of dam ..... feet, length of dam at top ..... feet, length of dam at bottom ..... feet. Material used in construction.....

.....
(State whether wood, earth, stone or concrete)

(b) Capacity of reservoir ..... acre-feet.
(c) Size of headgate: Width ..... feet, height ..... feet.
(d) Conduit....., width at bottom ..... feet,
(State whether ditch, flume or pipe)
width at water line ..... feet, depth of water ..... feet. Diameter of pipe ..... inches. Average grade per mile is ..... feet. Length of conduit is ..... miles and it crosses the following quarter sections: ..... to land de-

[Printed blanks can be obtained from the State Engineer.]

scribed in 5, I, (b), above [or to point described in 5, II, (c), above], which is the point of intended use.

8. The time required for the completion of the construction of such work is ..... years.
9. Time required for the complete application of the water to the proposed use is ..... additional years.

Be it known, that the undersigned hereby makes application for a permit to appropriate the public waters of the State of Idaho as herein set forth.

....., Applicant.

By ....., Agent.

Remarks:..... ....

....

APPROVAL OF STATE ENGINEER.

The number of this permit is .....

Date of first receipt of application, ...

Returned to applicant for correction, ...

Corrected application received .....

Recorded in Book ....., Page ....., Approved .....

This is to certify that I have examined the within application for a permit to appropriate the public waters of the State of Idaho and hereby grant the same, subject to the following limitations and conditions:

Good and sufficient bond to be filed in the sum of $..... on or before .....

Work to begin on or before ....., and to continue diligently and uninterruptedly to completion, unless temporarily interrupted by circumstances over which permit holder has no control.

One-fifth of the work above specified to be completed on or before .....

The whole of said work to be completed on or before .....

The time for proof of beneficial use of water appropriated in accordance herewith, extended to .....

Witness my hand this .... day of ....., 19..

....., State Engineer.

[Printed blanks can be obtained from the State Engineer.]

(Indorsed:) Permit No. .... To appropriate water from ....., ... County, Idaho. Date of first receipt at office of State Engineer, ... Returned to applicant for correction, ... Corrected application received, ... Recorded in Book ...., page ..... Approved ..... Work to begin ..... Bond to be filed ..... One-fifth of work to be completed ..... Whole work to be completed ..... Final proof of use of water, ... Fees, $.....

State Engineer's Instructions.

Application will not be accepted nor permit granted thereunder, unless the following instructions are carefully carried out in preparing application blank and maps.

As to Application Blank.

Section 1. Insert name of applicant. Also postoffice address and county of residence. Subdivisions "I" and "II" are to be filled in only when applicant is a corporation.

Sec. 2. State the quantity of water claimed in second-feet, one second-foot being the maximum allowed for fifty acres, except in very unusual cases. One second-foot is considered as the equivalent of fifty miner's inches measured under a four-inch pressure.

Sec. 3. Give name of stream or lake from which water is claimed. If a spring is the source of supply, give legal description of forty-acre tract in which it is situated. Where two or more sources are claimed, name or describe each separately and specify amount claimed from each.

Sec. 4. If point of diversion is on surveyed land, locate same by giving legal description of forty-acre tract in which it is situated. If upon unsurveyed land, give approximate distance to mouth of the stream from which water is claimed, or to the mouth of some creek putting into said stream in the vicinity. Where there is to be more than one point of diversion, number and describe *each separately*, and place such diversion numbers on the maps. In cases of springs on unsurveyed land, tie to some prominent and permanent landmark.

Sec. 5. Fill in Subdivision "I" if the water applied for is to be used for irrigation and domestic use. If intended for other purposes, fill in Subdivision "II."

Sec. 6. Give estimated cost of all construction works necessary to conduct water to place of use, including dams, ditches, flumes, etc. This should not include installation of machinery for power.

Sec. 7. In Subdivision "I" state generally what diversion works will be constructed. In Subdivision "I" give the dimensions of the works as indicated by the various blanks and give legal descriptions of quarter sections crossed by conduit.

Sec. 8. Indicate time desired within which to complete the diversion works, not exceeding five years.

Sec. 9. Indicate the time considered necessary to put water to beneficial use *after* the completion of the works, not exceeding four years.

As to Maps.

(A) Before permit will be granted applicant must file two maps showing the following details: (a) source or sources of supply; (b) point or points of diversion; (c) route of ditch or ditches delivering water within one mile of each 160-acre tract of the land to be irrigated; (d) lands to be irrigated to be shown by cross-hatching or outlining. If for power purposes, etc., the maps must show (a) source or sources of supply; (b) point or points of diversion; (c) route of ditch or ditches; (d) point or points of use; (e) point of return to stream after use.

(B) If the application is for more than twenty-five second-feet, the maps must be prepared from *actual survey*

[Printed blanks can be obtained from the State Engineer.]

and must be certified to by engineer in charge of survey, certificates to contain (1) engineer's name and post-office address; (2) date of survey.

[See township plat, p. 1767, *infra*.—THE AUTHOR.]

General.

(C) A filing fee of $1 for the first second-foot appropriated and ten cents additional for each additional second-foot or fraction must be paid by applicant before permit will issue.

(D) Application will be accepted *temporarily*, provided application blank be filed containing the information required in sections 1 to 4, inclusive, and the statement as to purpose for which water is claimed, whether for irrigation, or power, etc. Applicant will then have sixty days from the date application is returned to him for completion within which to run surveys (where required), prepare maps and pay filing fee. However, it is best to submit maps and fees when application is filed, in all cases where a survey is not required, that is where the amount claimed is not more than twenty-five second-feet.

(E) The space in the blank under the head of "Remarks" is to be used for matter strictly pertaining to the application. It must not be used for letter-writing.

Notice of Proof of Completion of Works. [*State Engineer's Form No. 103.*]

(This blank must be filled out by holder of permit and forwarded by registered mail to the State Engineer at least sixty days before the time set for completion of works.)

(P. O.) .....
(Date) .....

To the State Engineer of the State of Idaho, Boise, Idaho:

Dear Sir: Notice is hereby given that at .... M., on the .... day of ....., 19.., at ....., County of ....., State of Idaho, before ....., proof will be submitted of the completion of works for the diversion of ..... cubic feet per second of the waters of ....., in accordance with the terms and conditions of a certain permit heretofore issued by the State Engineer of the State of Idaho.

1. The name of the person or corporation holding said permit is ....

2. The postoffice address of such person or the place of business of such corporation is ....., County of ....., State of Idaho.

3. The number of such permit is ...., and the date set for the completion of such work is.....

4. Said water to be used for ..... purposes.

5. Said works of diversion will be fully completed on the day set for such completion, and the amount of water which said works

[Printed blanks can be obtained from the State Engineer.]

are capable of conducting to the place of intended use in accordance with the plans accompanying the application for such permit is ..... cubic feet per second.

6. The amount of lands for which said water is available is ..... acres, particularly described as follows:.....

(In case of canals or other works designed to divert and carry more than fifty cubic feet of water per second, the following certificate must be signed by a well-known and competent engineer.)

I hereby certify that the facts set forth in the above notice are true.

....., Engineer.

.....desires ..... that the above notice be published according to law, in the ..... of ....., published in the county in which said works are situated; the expense of which publication will be borne by .....

(Signature) .....

.....

.....

.....

State Engineer's Instructions—Proof of Completion of Works.

Boise, Idaho, ————.

Dear Sir: I inclose herewith blank form upon which to give notice that you are prepared and desire to submit proof of completion of works under your Permit No. ..... This form should be filled out and mailed to the State Engineer at least 60 days before the date upon which it is to be submitted, which proof MUST be on or before ..... Upon receipt of the blank properly filled out, notice must be published a period of four weeks prior to the date of proof. The proof may be submitted at any place convenient to you and two witnesses, where there is a notary public or other officer authorized to administer oaths. The certificate that shall be issued under this proof does not give you a perpetual right to the use of the water for which application was made, as it only confirms the completion of works of a capacity to divert and convey to the place of intended use a certain amount of water. The law requires that another proof be submitted when the water has been fully applied to a beneficial use, at which time license is issued for the amount of water actually in use. Information in regard to this last proof will be furnished on request.

Yours truly,

D. G. MARTIN,
State Engineer.

[Printed blanks can be obtained from the State Engineer.]

Permit No. .....

Notice of Proof of Application of Water to Beneficial Use. [*State Engineer's Form No. 121.*]

(This blank must be filled out by holder of permit and forwarded to the State Engineer at least sixty days before the time set for application of water.)

(P. O.) .....

(Date) .....

To the State Engineer of the State of Idaho, Boise, Idaho:

Dear Sir: Notice is hereby given that at .... M. on the .... day of ....., 190.., at ....., County of ....., State of Idaho, before ....., proof will be submitted of the application to beneficial use of ..... cubic feet per second of the waters of ....., in accordance with the terms and conditions of Permit No. .... heretofore issued by the State Engineer of the State of Idaho.

1. The name and postoffice address of the person or corporation holding said permit are .....

2. The use to which said water has been applied is .....

3. The amount applied to beneficial use is .....

4. The place where said water is used is (if for irrigation, give full and accurate description of the lands irrigated).....

5. The name of the canal or ditch or other works by which said water is conducted to such place of use is .....

6. The right to take the water from such works is based upon Permit No. .....

7. The source of supply from which such water is diverted is ....

8. The date of the priority which said user is prepared to establish is .....

I desire that the above notice be published, according to law, in the ..... of ....., published in the county in which said water is to be used; the expense of which publication will be borne by me.

(Sign) .....

[Printed blanks can be obtained from the State Engineer.]

Boise, Idaho, ...

Dear Sir: I inclose herewith blank Notice of Proof of Application of Water to Beneficial Use under your permit No. ...., which kindly fill out and return to me at least 60 days before the date upon which you wish to submit proof. The date of the proof is set out in your permit, and if proof is submitted subsequent to that your priority will be advanced a time equal to the difference of the time between the date proof should have been submitted and the date it is submitted.

Yours truly,
D. G. MARTIN,
State Engineer.

Notice of Publication. [*State Engineer's Form No. 104.*]

Notice is hereby given that at .... M., on the .... day ....., 19.., at ....., County of ....., State of Idaho, before ....., proof will be submitted of the completion of works for the diversion of ..... cubic feet per second of the waters of ....., in accordance with the terms and conditions of a certain permit heretofore issued by the State Engineer of the State of Idaho.

1. The name of the person or corporation holding said permit is ....

2. The postoffice address of such person or the place of business of such corporation is ....., County of ....., State of Idaho.

3. The number of such permit is ...., and the date set for the completion of such work is ....

4. Said water to be used for ..... purposes.

5. Said works of diversion will be fully completed on the date set for such completion, and the amount of water which said works are capable of conducting to the place of intended use, in accordance with the plans accompanying the application for such permit, is ..... cubic feet per second.

6. The amount of lands for which said water is available is ..... acres, particularly described as follows:.....

....., State Engineer.

Dear Sirs: Inclosed find Notice for Publication of Proof of Completion of Works under Permit No. ...., which please publish once a week for four consecutive weeks in your paper in accordance with provisions of section 4, House Bill No. 146, laws of the Seventh Session of the Legislature. The expense of this publication will be paid by ....., to whom

[Printed blanks can be obtained from the State Engineer.]

you will please furnish proof of publication of this notice on or before ..... Please promptly acknowledge receipt of this notice, and kindly mail me your first issue containing its publication that I may compare it with my records.

Yours truly,

....., State Engineer.

(Place) .....

(Date) .....

State Engineer, Boise.

Dear Sir: I have your letter of ..... inclosing Notice of Completion of Works under Permit No. ...., which will be published as you request, beginning with our issue of ....

Notice for Publication—Notice of Proof of Application of Water to Beneficial Use. [*State Engineer's Form No. 122.*]

Notice is hereby given that on the .... day of ....., 190.., at ....., County of ....., State of Idaho, proof will be submitted of the application to beneficial use of ..... cubic feet per second of the waters of ....., in accordance with the terms and conditions of Permit No. ...., heretofore issued by the State Engineer of the State of Idaho.

1. The name and postoffice address of the person or corporation holding said permit are .....

2. The use to which said water has been applied is.....

3. The amount applied to beneficial use is.....

4. The place where said water is used is (if for irrigation, give full and accurate description of the lands irrigated).....

5. The name of the canal or ditch or other works by which said water is conducted to such place of use is.....

6. The right to take the water from such works is based upon Permit No. ....

7. The source of supply from which such water is diverted is .....

8. The date of the priority which said user is prepared to establish is ....

Dear Sirs: Inclosed find Notice for Publication of Proof of Beneficial Use of Water under Permit No. ..... which please publish once a week for four consecutive weeks in your paper in accordance with provisions of section 4, House Bill No. 146, laws of the Seventh Session of the Legislature. The expense of this publication will be paid by ....., to whom you will please furnish proof of publication of this notice on or before ..... Please promptly acknowledge receipt of this notice, and kindly mail me your first issue containing its publication that I may compare it with my records.

Yours truly,

....., State Engineer.

[Printed blanks can be obtained from the State Engineer.]

(Place) .....
(Date) .....
State Engineer, Boise, Idaho,
Dear Sir: I have your letter of ..... inclosing Notice of Proof of Beneficial Use of Water under Permit No. ...., which will be published as you request, beginning with our issue of .....

.....

Notice of Proof of Completion of Works and Application of Water to Beneficial Use.

Notice is hereby given that at ....., on the .... day of ....., 19.., at ....., County of ....., State of Idaho, before ....., proof will be submitted of the completion of works for the diversion of ..... cubic feet per second of the waters of ....., and of the application to beneficial use of said water in accordance with the terms and conditions of Permit No. ...., heretofore issued by the State Engineer of the State of Idaho.

1. The name and postoffice address of the person, or corporation, holding said permit, are .....

2. Said works of diversion will be fully completed on the date set for such completion, and the amount of water which said works are capable of conducting to the place of use, in accordance with the plans accompanying the application for such permit is ..... cubic feet per second.

3. The use to which said water has been applied is irrigation and domestic ..... purposes, and the amount applied to beneficial use is ..... cubic feet per second.

4. The place where said water is used is .....

5. The date of priority which said user is prepared to establish is ....

D. G. MARTIN,
State Engineer.

Dear Sirs: Inclosed find Notice for Publication of Proof of Completion of Works and Beneficial Use of Water under Permit No. ...., which please publish once a week for four consecutive weeks in your paper in accordance with provisions of section 4, House Bill No. 146, laws of the Seventh Session of the Legislature. The expense of this publication will be paid by ....., to whom you will please furnish proof of publication of this notice on or before ..... Please promptly acknowledge receipt of this notice, and kindly mail me your first issue containing its publication that I may compare it with my records.

Yours truly,
.....,
State Engineer.

[Printed blanks can be obtained from the State Engineer.]

(Place) .....
(Date) .....

State Engineer, Boise, Idaho.

Dear Sir: I have your letter of ..... inclosing Notice of Proof of Completion of Works and Beneficial Use of Water under Permit No. ...., which will be published as you request, beginning with our issue of .....

.....

Permit No. .....

Proof of Completion of Works—Deposition of Holder. [*State Engineer's Form No. 107.*]

Question 1. State your name, age, residence, occupation and postoffice address.

Ans. ....

Ques. 2. If acting in behalf of a corporation, state its name, principal place of business, your position with reference to same, and your authority for appearing in its behalf.

Ans. ....

Ques. 3. State number and date of permit, amount of water you are authorized to divert, source, and point of diversion.

Ans. ....

Ques. 4. State purpose for which water is to be used, and, if for irrigation, state the number of acres and give description of the land you intend to reclaim.

Ans. ....

Ques. 5. State whether or not the water has been turned into your works of diversion, and, if so, when and to what extent.

Ans. ....

Ques. 6. State whether or not the works of diversion are fully completed, and whether or not they comply in all respects with the terms of the permit.

Ans. ....

Ques. 7. If the works of diversion do not comply with all the terms of your permit, state fully those particulars in which there is any variance.

Ans. ....

Ques. 8. Give description of works, state dimensions and capacity of each part, and give cost of same.

Ans. ....

(Sign here.).....

[Printed blanks can be obtained from the State Engineer.]

I hereby certify that the foregoing testimony was read to the above subscriber before its signing, that I believe him to be the person he represents himself to be, and that said testimony was subscribed and sworn to before me, at my office in ....., County of ....., State of Idaho, on this .... day of ....., A. D. 191..

.....

(The depositions of two witnesses, in this form, taken separately, required in each case.)

Permit No. .....

Proof of Completion of Works—Deposition of Witness. [*State Engineer's Form No. 108.*]

Question 1. State your name, age, residence, occupation and postoffice address.

Ans. ....

Ques. 2. Are you acquainted with ....., the holder of Permit No. ...., authorizing the diversion of ..... second-feet of the waters of ....., at ....., for ..... purposes? How long have you known him, and where does he reside?

Ans. ....

Ques. 3. Have you read or heard read said Permit No. ...., and are you familiar with its terms and conditions?

Ans. ....

Ques. 4. (If for irrigation purposes.) Are you acquainted with the land proposed to be irrigated under said permit? If so, describe same, state its character, and give your estimate of the amount of water required for its profitable cultivation.

Ans. ....

Ques. 5. Are the works of diversion fully completed and of sufficient capacity to convey the entire amount of water set out in the permit from point of diversion to place of use?

Ans. ....

[Printed blanks can be obtained from the State Engineer.]

Ques. 6. Describe the works of diversion as they now exist, and give your estimate of their capacity.

Ans. ....

(Sign here.) .....

I hereby certify that the foregoing testimony was read to the above subscriber before its signing, that I believe him to be the person he represents himself to be, and that said testimony was subscribed and sworn to before me, at my office in ....., County of ....., State of Idaho, on this .... day of .....:, A. D. 191..

.....

State Engineer's Instructions.

Proof of Completion of Works.

Dear Sir: I inclose herewith the following forms to be used in connection with proof of completion of works under your permit No. .....: Deposition of permit holder; depositions of two witnesses. In submitting this proof the following instructions should be CAREFULLY followed out, since failure to do so may result in the loss of your rights: 1. On ....., the date set for proof of completion of works, the inclosed deposition forms (one for permit holder and one each for two witnesses) should be filled out and sworn to, at ..... 2. When the depositions have been taken they should be mailed to this office, together with affidavit of publication of notice and fee of $5. When these have been received, together with report of the examining engineer if everything is properly executed, Certificate of Completion of Works will issue.

Yours truly,

D. G. MARTIN,
State Engineer.

Permit No. .....

Proof of Application of Water to Beneficial Use—Deposition of Holder. [*State Engineer's Form No. 124.*]

Question 1. State your name, age, residence, occupation and postoffice address.

Ans. ....

Ques. 2. If acting in behalf of a corporation, state its name, principal place of business (if a foreign corporation, give name and postoffice of statutory agent), your position with reference to same, and your authority for appearing in its behalf.

Ans. ....

Ques. 3. State number and date of permit, and date of priority you propose to establish under the permit.

Ans. ....

[Printed blanks can be obtained from the State Engineer.]

Ques. 4. State source of water supply and give exact location of point of diversion.

Ans. .....

Ques. 5. Describe your works of diversion, and state amount of water they are capable of conveying from point of diversion to place of use, and give name of canal or ditch or other works by which water is conducted to such place of use.

Ans. .....

Ques. 6. State for what purpose water is used and describe place of use. (If for irrigation, name each subdivision in which used, and number of acres in each subdivision that have *actually* been irrigated with said water.)

Ans. .....

Ques. 7. If for other than irrigation purposes, state how applied, amount of horse-power generated, etc.

Ans. .....

Ques. 8. What is the minimum amount of water required for the use specified above?

Ans. .....

Ques. 9. If you are not the person or representative of the corporation to whom above-mentioned permit was originally issued, please state how ownership was acquired by present holder.

Ans. .....

Ques. 10. State when, how, in what amount and to what extent the water diverted under above-mentioned permit has been used.

Ans. .....

Ques. 11. State when, how, in what amount and to what extent waters other than those diverted under the above-mentioned permit have been diverted and applied to beneficial use upon the lands herein described. Give full particulars regarding such other appropriations and rights claimed thereunder.

Ans. .....

(Sign) .....

I hereby certify that the foregoing testimony was read to the above subscriber before its signing, that I believe him to be the person he represents himself to be, and that said testimony was subscribed and sworn to before me, at my office in .....,

[Printed blanks can be obtained from the State Engineer.]

County of ....., State of Idaho, on this .... day of ....., A. D. 19..

.....

.....

(Indorsed:) Permit No. .... Proof of application of water to beneficial use. Deposition of Holder. Amount of water, ... second-feet. Source, ... County, ... Purpose, ... Place of use, ... Date of priority, ... Received and filed, ...

(The deposition of two witnesses, on this form, taken separately, required in each case.)

Permit No. .....

Proof of Application of Water to Beneficial Use—Deposition of Witness. [*State Engineer's Form No. 125.*]

Question 1. State your name, age, residence, occupation and postoffice address.

Ans. ....

Ques. 2. Are you acquainted with ....., the holder of Permit No. ....? How long have you known him and where does he reside?

Ans. ....

Ques. 3. Have you read or heard read said Permit No. ...., and are you familiar with its provisions and conditions?

Ans. ....

Ques. 4. State source of water supply, place of diversion, and describe works for conveying water from point of diversion to place of use.

Ans. ....

Ques. 5. How many second-feet of water do you estimate said works will safely conduct to place of use, and how much water have you seen being so conveyed.

Ans. ....

Ques. 6. State for what purpose water is used and at what place. (If for irrigation, give each subdivision in which water has been used and number of acres irrigated in each subdivision.)

Ans. ....

[Printed blanks can be obtained from the State Engineer.]

Ques. 7. If for power or other purposes than irrigation, state how water has been applied and to what extent.

Ans. .....

Ques. 8. (If for irrigation) state character of land that has been reclaimed, and give your estimate of the amount of water required for its profitable cultivation.

Ans. .....

Ques. 9. Have you any interest in the works, water or lands above mentioned? If so, in what way and to what extent?

Ans. .....

Ques. 10. State when, how, in what amount and to what extent you have witnessed the application to beneficial use of the water diverted under said permit.

Ans. .....

(Sign).....

I hereby certify that the foregoing testimony was read to the above subscriber before its signing, that I believe him to be the person he represents himself to be, and that said testimony was subscribed and sworn to before me, at my office in ....., County of ....., State of Idaho, on this .... day of ....., A. D. 19..

.....

.....

(Indorsed:) Permit No. ..... Proof of application of water to beneficial use. Deposition of Witness. Received and filed .....

Report of Water Commissioner. [*State Engineer's Form No. 106.*]

1. State name of applicant and number of permit.....
2. State source of water supply.....
3. Location of point of diversion.....
4. State whether or not the works of diversion are *fully* completed and in accordance with terms of permit.....
5. Describe works as they exist, giving dimensions of same as follows:
   (a) Width of conduit at bottom.....
   (b) Width at water line.....

[Printed blanks can be obtained from the State Engineer.]

(c) Depth of water.....

(d) Grade per mile.....

6. State whether or not water has been turned into works of diversion, and if so, to what extent.....

7. Give exact location of lands to be irrigated. Give exact number of acres under cultivation in each forty-acre tract.....

8. Submit map on inclosed plat, source of supply, point of diversion, route of ditch or ditches and cross-hatch lands to be irrigated.

Remarks..... ....

.....

State of Idaho,
County of .....,—ss.

....., being first duly sworn, deposes and says that the statements contained in the within report are correct to the best of his knowledge and belief.

Subscribed and sworn to before me this .... day of ....., 19..

.....,
Notary Public.

My commission expires .....

State Engineer's Instructions.

Proof of Beneficial Use.

Dear Sir: I inclose herewith the following forms to be used in connection with proof of application of water to beneficial use under your permit No. ....: Deposition of permit holder; depositions of two witnesses. In submitting this proof the following instructions should be CAREFULLY followed out, since failure to do so may result in the loss of your rights: 1. On ....., the date set for the proof of application of water to beneficial use, the inclosed deposition forms (one for permit holder and one each for two witnesses) should be filled out and sworn to, at ..... 2. When the depositions have been taken, they should be mailed to this office, together with affidavit of publication of notice and fee of $2 for each 40-acre tract, or fraction, to which water has been applied. When these have been received, together with report of examining engineer, if everything is properly executed, License will issue.

Yours truly,

.....,
State Engineer.

Proof of Completion of Works and Proof of Beneficial Use of Water.

This form when both proofs are made on same date.

Dear Sir: I inclose herewith the following forms to be used in connection with proof of completion of works and beneficial use of water under permit No. ....: Deposition of permit holder; depositions of two witnesses. In submitting this proof the following instructions should be CAREFULLY followed out, since fail-

[Printed blanks can be obtained from the State Engineer.]

ure to do so may result in the loss of your rights: 1. On ....., the date set for proof, the inclosed forms (two for permit holder and two each for two disinterested witnesses) should be filled out and sworn to, at ....., before ..... 2. When the depositions have been taken they should be mailed to this office, together with affidavit of publication of notice and fees as follows: Fee for proof of completion of works is $5 for ten second-feet or less. Over ten second-feet a charge of 30 cents a second-foot is made. The fee for beneficial use of water, for power purposes is $5; if for irrigation, $2 for each 40-acre tract, or fraction, to which water has been beneficially applied. When these have been received, together with report of the Water Commissioner, if everything is properly executed, Certificate of Completion of Works and License will issue.

Yours truly,

....., State Engineer.

Permit No. .....

Certificate of Completion of Works. [*State Engineer's Form No. 110.*]

To All Whom It May Concern:

This is to certify that ....., of ....., County of ....., and State of ....., the holder.. of Permit No. ...., issued upon Application No. ...., bearing date of priority of ....., authorizing the diversion of ..... second-feet of the waters of ....., County of ....., State of Idaho, for ..... purposes, ha.. fully complied with the provisions of the laws of the State of Idaho relating to the proof of completion of the works of diversion set out and described in said permit; that said works are adequate for diverting and conveying to the place of intended use..... second-feet of the waters of.....; that the point of diversion of said waters ....., and that the lands proposed to be irrigated by the use of said water are described as follows, to wit:.....

Witness my hand this .... day of ....., A. D. 191..

....., State Engineer of the State of Idaho.

(Indorsed:) Permit No. ..... Certificate of Completion of Works. Dated ....., 191.. Stream, ... County, ... Amount, ... Date of priority, ... Recorded in Book ...., of ...., page ....

[Printed blanks can be obtained from the State Engineer.]

Water License No. ....

Whereas, on the .... day of ....., A. D. 19.., ... of ....., County of ....., State of ....., duly made application (No. ....) to me for a permit to use ....., County of ....., State of Idaho, for ..... purposes, and

Whereas, on the .... day of ....., A. D. 19.., Permit No. .... was issued to said applicant.. for the diversion of said water, and providing for the completion of the works of diversion therein described on or before the .... day of ....., A. D. 19.., and for the application to beneficial use of said water on or before the .... day of ....., A. D. 19.., and,

Whereas, on the .... day of ....., A. D. 19.., ..., the holder.. of said permit duly made proof of the completion of adequate works for the diversion of ..... cubic feet per second of said waters, as evidenced by my Certificate No. ...., dated ....., confirming the completion of works of sufficient capacity for diverting and conveying to the place of intended use ....., with date of priority of ..... and,

Whereas, on the .... day of ....., A. D. 19.., ..., the holder of said permit duly made proof of the application to beneficial use of ..... cubic feet per second of said water:

Now, therefore, by virtue of authority vested in me by the laws of the State of Idaho, I hereby grant and confirm to ....., of ..... County of ....., State of ....., the holder.. and owner.. of said Permit No. ...., a perpetual right, dating from ....., to the use of ....., in the County of ..... and State of Idaho, or so much thereof as may be necessary for the purposes hereinbelow mentioned, to be diverted ....., and conducted to and upon ....., for the purpose.. of ....., subject, however, to the laws of the State of Idaho applicable to a license for the use of the waters of the State, and subject, also, to the local or community customs, rules and regulations which have been or may be adopted from time to time by a majority of the users from a common source of supply, canal or lateral from which such water may be taken, when such rules and regulations have for their object the economical use of such water.

[Printed blanks can be obtained from the State Engineer.]

Witness, my hand and the seal of my office at Boise, Idaho, this .... day of ....., A. D. nineteen hundred and .....

....,
State Engineer.

(Indorsed:) State of Idaho. Water License No. ..... To ..... Source of Supply, ..., ... County. Amount, ... second-feet. Point of diversion, ... Place of use, ... Purpose, ... Date of priority,..... Recorded ..... in Book ...., of ...., page .....

[Printed blanks can be obtained from the State Engineer.]

(3d ed.)

§ 1463. NEBRASKA FORMS.

(1911.)

Application for a permit to appropriate the waters of the State of Nebraska.
Township plats—Showing line of ditch or canal.
Application for permit to appropriate the waters of the State of Nebraska for power.
Township plats—Showing course of stream and location of works.
Petition for a permit to relocate irrigation works.
Township plats—Showing line of ditch or canal.
Application for a permit to construct drainage works.
Township plats—Showing course of canal and location of lake.
Claim for the waters of the State of Nebraska.
Township plats—Showing line of ditch or canal.
Proof of appropriation of the waters of the State of Nebraska.
Proof of appropriation of the waters of the State of Nebraska for power.
Certificate of appropriation of water.

Permit No. .....

Water Division No. ....., District No. .....

(The above to be filled out at the office of the board.)

Application for a Permit to Appropriate the Waters of the State of Nebraska.

I, ...of the
(Name of person signing application.)
....County of
(City or village of which a resident.)
....., State of ....., being
(Name of county.) (Name of state.)
duly sworn, upon my oath say:

1st.—That the name of the applicant herefor is .....
....., Post-
(Name of person or company for whom application is made.)
office Address No. .....Street,
(Number and street.)
....County, ...
(City or village.) (County.) (State.)

2d.—That it is proposed to use the water applied for herein, for
....
(State the purpose for which water is to be appropriated.)

[Printed blanks can be obtained from the State Engineer.]

3d.—That the name adopted for the proposed ditch or canal is the ....
(Name of the canal.)

4th.—That the source of the proposed appropriation is.....
.....
(Name of creek or river from which water is to be taken.)

5th.—That the amount of the appropriation desired is.....
..... cubic feet per second of time.
(Number of cubic feet.)

6th.—That it is proposed to locate the headgate on the.....
.....bank of the stream,
(North, south, east or west.)
in .....of sec-
(Describe lot or forty acres in which situated.)
tion ....., Township ....., Range
(Number.) (Number.)
..... of the .....Principal
(Number, east or west.) (Number.)
Meridian.

7th.—That the said ditch or canal will be.....
(Number of miles.)
.....miles in length, and pass through the following sections of land, as shown on the accompanying township plats, viz.:

.....
(Describe each section through which canal passes, stating township and range.)

8th.—That the dimensions of the proposed ditch or canal will be as follows: *Headgate*—width in clear, ...
feet; depth of water on floor at low water, ...feet.

Canal or Ditch.

Number of feet. Location.	Depth.	Width on Bottom.	Width on Top.	Depth in feet. Grade per mile
Below headgate.....	feet.....	feet.....	feet.....	.feet.
At.... mile.....	feet.....	feet.....	feet.....	.feet.
At.... mile.....	feet.....	feet.....	feet.....	.feet.
At.... mile.....	feet.....	feet.....	feet.....	.feet.
At.... mile.....	feet.....	feet.....	feet.....	.feet.

(Give dimension at each point where reduced in size, stating miles from headgate.)

[Printed blanks can be obtained from the State Engineer.]

9th.—That the material to be removed amounts to .....
..... cubic yards, consisting of
(Number of yards.)
.....
(State character of material to be moved; whether rock, boulders, sand or clay, etc.)
and that the total length of fluming required is .....
(Number of feet.)
..... feet.

10th.—That the estimated cost of the proposed construction is as follows: Earthwork, $....., Fluming, $....., Headgate, $.....
Other expenses, $....., Total, $.....

11th.—That the proposed ditch or canal is to be built with the intention of supplying water to irrigate the following sections or quarter sections of land, viz.. .....
.....
(Give sections and quarter sections, stating number, township, and range.)
which land is not covered by any prior appropriation amounting in all to ..... acres.
(Total number of acres.)

12th.—That construction is to be begun within.....
(Number of days or months.)
of the date hereof, and the proposed works are to be completed on or before .....
(State day, month, and year.)

13th.—That the time estimated as necessary to provide for the application of the amount of water herein applied for to the beneficial use above stated is.....years from
(Number of years.)
....., 19....
(Month and day.)

14th.—That the relation which the subscriber to this affidavit bears to said applicant is that of.....
..... and
(State whether "president," "partner," etc., or "the applicant himself.")
that he is authorized to make this affidavit in behalf of the interests affected.

.....
(Signature.)

[Printed blanks can be obtained from the State Engineer.]

State of .....,
County of .....,—ss.

I hereby certify that the foregoing application was signed in my presence and sworn to before me by ....., this .... day of ....., 19..

.....,
Notary Public.

State of Nebraska,
Office State Board of Irrigation,—ss.

This is to certify that the foregoing application has been examined..... ....

STATE BOARD OF IRRIGATION,

.....,
State Engineer, Secretary.

This is to certify that the foregoing application has been examined and is hereby granted subject to the following limitations and conditions:

1st. The work of excavation or construction shall begin on or before ....., 19..

2d. The time for completing the work of construction shall extend to ....., 19..

3d. The time for completing the application of water to the beneficial use indicated shall extend to ....., 19..

4th. The water appropriated shall be used for the purpose of irrigation.

5th. The prior right of the owners of land bordering on this stream, or through which this stream flows, to so much of the natural flow of the stream as is necessary for domestic uses, including stock water, must be respected.

6th. The prior rights of all persons who, by compliance with the laws of the State of Nebraska, have acquired a right to the use of the waters of this stream must not be interfered with by this appropriation.

7th. The amount of the appropriation shall not exceed ..... cubic feet per second of time; neither shall it exceed the capacity of said ditch or canal, nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry; and, further, said appro-

[Printed blanks can be obtained from the State Engineer.]

priation, under any circumstances, shall be limited to one-seventieth (1/70) of a cubic foot per second of time, for each acre of land to which water is actually and usefully applied, on or before .....

STATE BOARD OF IRRIGATION,

....,

State Engineer, Secretary.

Approved ....., 19...

(Indorsed:) No..... Division No. ..... District No. ..... Application for a Permit to Appropriate the Waters of the State of Nebraska. State of Nebraska, Office State Board of Irrigation, —ss. This instrument was filed for record at .... o'clock .... noon, on the .... day of ....., 19.., and duly recorded in Book .... of the Record of Applications for Appropriations, on page ....., ..., State Engineer, Secretary.

Township Plats—Showing Line of Ditch or Canal.

The following township plats. .....
(No. filled out.)
in number, show where the said ditch or canal heads, and where it crosses each quarter section of land along the line of its course.

.....
Signature of person signing application.

NOTICE.—The blanks for No. of Township, Range, etc., at top of blank plats, must be properly filled out. Plat No. 1 should be used in which to locate the head of the canal, and Plats No. 2, No. 3, etc., must be used in their order for each successive township into which the canal enters. All tracing, lettering, etc., must be done in ink, free from blurs or blots. If four blank plats are not sufficient to show the entire line of the canal, a special additional blank will be furnished free of charge, upon application to the office of the State Board.

[See township plat, p. 1767, *infra*.—THE AUTHOR.]

[Printed blanks can be obtained from the State Engineer.]

Application No. .....

Water Division No. ....., District No. .....

Application for Permit to Appropriate the Waters of the State of Nebraska for Power.

I, ..., of
(Name of person signing application.)
....., County of .....
(City or village of which a resident.) (Name of county.)
State of ....., being duly sworn, upon my oath say:
(Name of state.)

1st.—That the name of the applicant is.....
.....
(Name of person or company for whom application is made.)
Postoffice address, No..... Street, ...
(Number and street.) (Town.)
..... County, ...
(County.) (State.)

2d.—That the water is to be used for the purpose of operating a .....

3d.—That the name adopted for the plant is the .....

4th.—That the source of the appropriation claimed is .....
(Stream.)

5th.—That the amount of the appropriation claimed is.....
..... cubic feet per second of time.

6th.—That the headgate of the race is located on the ..... bank of the stream in ..... of section ....., Township ....., Range ....., of the ..... Principal Meridian.

7th.—That the said race will be ..... feet in length, and pass through the following sections of land as shown on the accompanying township plats, viz.:.....

8th.—That the dimensions of the race will be as follows:

At Headgate—width in clear ..... feet; depth of water on floor at low water ..... feet.

Below Headgate—depth ..... feet; width on bottom ..... feet; width on top ..... feet; grade per mile ..... feet.

9th.—That the works will be located on.....

10th.—That the power is to be obtained from a.....
(Kind of wheel.)

[Printed blanks can be obtained from the State Engineer.]

wheel, manufactured by ....., catalogue No. ....,
(If the wheel is not a turbine give dimensions and kind of wheel.)
diameter of wheel ..... inches.

11th.—That the capacity of the plant will be .....

12th.—That the net power required from the shaft of the wheel to operate the mill when in good repair and proper running order will be ..... horse-power.

13th.—That the maximum head or fall that it is practical to maintain at average low-water stage of stream is .....
(This should give the difference in height between the level of the water in the forebay and in the tail-race.)
feet.

14th.—That the amount of water necessary to operate said plant will be ..... cubic feet per second.

15th.—That the stream furnishes:

(a) At low-water stage ..... cubic feet per second.

(b) At medium stage ..... cubic feet per second.

(c) At high-water stage..... cubic feet per second.

16th.—That the work of construction will begin on or before the .... day of .....

17th.—That the works will be completed on or before the .... day of .....

18th.—That the works will be put in operation on or before the ....day of .....

19th.—That the plant will be operated.....
(Continuously or otherwise.)

20th.—That the proposed cost of said plant is as follows:

Dam, $.....; Race, $.....; Machinery, $.....; Buildings, $.....; Total, $.....

21st.—That the relation which the subscriber to this affidavit bears to said plant is that of .....,
(State whether owner, manager, etc.)
and that he is authorized to make this affidavit in behalf of the interests affected.

.....,

[Printed blanks can be obtained from the State Engineer.]

State of Nebraska,
County of ....,—ss.

I hereby certify that the foregoing application was signed in my presence and sworn to before me by ....., this .... day of ....., 1....

.....,
Notary Public.

This is to certify that the foregoing application has been examined and is hereby granted, subject to the following limitations and conditions:

1st.—The work of excavation or construction shall begin on or before ....., 1....

2d.—The time for completing the work, or perfecting the appropriation, shall extend to ....., 1....

3d.—The time for completing the application of water to the beneficial use indicated shall extend to ....., 1....

4th.—The amount of the appropriation shall not exceed ..... cubic feet per second.

5th.—The rights of all persons who by compliance with the laws of the State of Nebraska governing in the appropriation of water, or who by continuous beneficial use have acquired the right to the use of the waters of ....., or any tributary stream, or any stream to which ..... is tributary, prior to the date of this filing, shall not be interfered with by this appropriation.

6th.—This grant is made subject to the provisions of section 43, article 2, of the Nebraska Irrigation Law, which gives preference to appropriators using the water for domestic and agricultural uses, over those using it for manufacturing purposes.

Approved. .....,
State Engineer, Secretary.

(Indorsed:) No. ..... Division No. ....., District No. ..... Application for a Permit to Appropriate the Waters of the State of Nebraska for Power. State of Nebraska, Office State Board of Irrigation,—ss. This instrument was filed for record at .... o'clock, ... noon, on the .... day of ....., 1...., and

[Printed blanks can be obtained from the State Engineer.]

duly recorded in Book .... of the Record of Applications for Appropriations, on page ...., State Engineer, Secretary.

NOTE.—This application, if approved, must be followed within six months by a map or plat on a scale of not less than two inches to the mile, showing the location of the works and the course of the stream.

Township Plats—Showing Course of Stream and Location of Works.

The following township plats, ... in number, show
(No. filled out)
where the race or canal heads, and where it crosses each quarter section of land along the line of its course and the location of the works.

.....,
Signature of person signing application.

NOTICE.—The blanks for No. of Township, Range, etc., at top of blank plats, must be properly filled out. Plat No. 1 should be used in which to locate the head of the canal, and Plats No. 2, No. 3, etc., must be used in their order for each successive township into which the canal enters. All tracing, lettering, etc., must be done in ink, free from blurs or blots. If four blank plats are not sufficient to show the entire line of the canal, a special additional blank will be furnished free of charge, upon application to the office of the State Board.

[See township plat, p. 1767, *infra*.—THE AUTHOR.]

Petition No. .....

....., No. .....
(Claim or application.)

Water Division, No. ..... District, No. .....
(The above to be filled out at the office of Board.)

Petition for a Permit to Relocate Irrigation Works.

I, ... of the
(Name of person signing petition.)
....., County of .....,
(City or village of which a resident.) (Name of county.)
State of ....., being duly sworn, upon
(Name of State.)
my oath say:

1st.—That the name of the petitioner herefor is .....
.....
(Name of person or company for whom petition is filed.)

[Printed blanks can be obtained from the State Engineer.]

Postoffice address, ...
(Street number and city or village.) (County.)
County, ...
(State.)

2d.—That this is a petition for a permit to relocate.....
.....
(State what is desired to relocate, whether it is a portion of the main line of the ditch or canal, or merely the headgate and head-reach.)

3d.—That the name of the ditch, canal or other works referred to in this petition is the .....
(Name of ditch or canal.)

4th.—That the source of the water supply thereof is .....
(Name of
.....
stream from which water is diverted.)

5th.—That the appropriation therefor is claimed by virtue of rights acquired by .....
(State whether appropriation is deemed to have been acquired by application of water to a beneficial use, previous to 1889, or by posting a notice in compliance with the irrigation law of 1889, or by filing an application with the State Board of Irrigation.)

6th.—(a) That the present location of the headgate is on the ..... bank of the stream, in .....
(North, south, east, or west.) (Describe lot or
....., of Section ....., Township
forty acres in which situated.) (Number.)
....., Range ....., of
(Number, north or south.) (Number, east, or west.)
the ..... Principal Meridian.
(Number.)

(b) That the proposed location of the headgate is on the .....
..... bank of the stream, in .....
(North, south, east or west.) (Describe lot or
....., of Section ....., Township .....
forty acres in which situated.) (Number.)
....., Range ..... of the
(Number, north or south.) (Number, east, or west.)
..... Principal Meridian.
(Number.)

7th.—That the said ditch or canal, ... miles in length,
(Number of miles.)
passes through the following quarter sections of land, as shown on the accompanying township plats, viz.:.....
.....
(Describe each quarter section through which ditch or canal passes, stating township, range, etc.)

[Printed blanks can be obtained from the State Engineer.]

(a) That the portions of said ditch or canal, ... miles
(Number of miles.)
in length, indicated on said plats by a continuous black line, is completed.

(b) That the portion of said ditch or canal, ... miles
(Number of miles.)
in length, indicated on said plats by a dotted black line, is not completed.

8th.—That the said ditch or canal, when relocated, will be ..... miles in length and pass through the following
(Number of miles.)
quarter sections of land, as shown on the accompanying township plats, viz.: .....
(Describe each quarter section through which ditch or canal passes, stating township, range, etc.)

(a) That the portion of said ditch or canal, ... miles
(Number of miles.)
in length, indicated on said plats by continuous and dotted black lines, show course thereof as originally located.

(b) That the portions of said ditch or canal, ... miles
(Number of miles.)
in length, indicated on said plats by red lines, show course thereof as relocated.

9th.—That the estimated cost of proposed relocation is as follows: Earthwork, $..... Fluming, $..... Headgate, $..... Other expenses, $..... Total, $.....

10th.—That the work of relocation is to be begun within .... of the date hereof, and the same
(Number of days or months.)
will be completed on or before .....
(State day, month and year.)

....., (Signature.)

State of .....,
County of .....,—ss.

I hereby certify that the foregoing petition was signed in my presence and sworn to before me by ....., this .... day of ....., 19..

[Seal] .....
Notary Public.

[Printed blanks can be obtained from the State Engineer.]

State of Nebraska,
Office State Board of Irrigation.

This is to certify that the foregoing petition has been examined

....

STATE BOARD OF IRRIGATION,

.....,

State Engineer, Secretary.

(Indorsed:) Petition No. ....
(Claim or application.)
..... No. ..... Division No. ....., District No. ..... Petition for a Permit to Relocate Irrigation Works. State of Nebraska, Office State Board of Irrigation,—ss. This instrument was filed for record at .... o'clock, ... noon, on the .... day of ....., 19.., and duly recorded in Book .... of the Record of Petitions for Relocations, on page ...., State Engineer, Secretary.

NOTE.—This petition, if approved, must be followed within sixty days by a map or plat on a scale of two inches to the mile, showing the location of the diverting and distributing works as relocated, the source of supply, and the legal subdivisions of land irrigated.

Township Plats—Showing Line of Ditch or Canal.

The following township plats, ... in number, show
(No. filled out.)
where the said ditch or canal heads, and where it crosses each forty-acre tract of land along the line of its course, also the course of the stream from which water is diverted.

.....,
Signature of person signing petition.

NOTICE.—The blanks for No. of Township, Range, etc., at top of blank plats, must be properly filled out. Plat No. 1 should be used in which to locate the head of the canal, and Plats No. 2, No. 3, etc., must be used in their order for each successive township into which the canal enters. All tracing, lettering, etc., must be done in ink, free from blurs or blots. If four blank plats are not sufficient to show the entire line of the canal, a special additional blank will be furnished free of charge, upon application at the office of the State Board.

[See township plat, p. 1767, *infra*.—THE AUTHOR.]

(Indorsed:) Petition No. ....
(Claim or Application.)
No. ..... Division No. ....., District No. ..... Petition for a Permit to Relocate Irrigation Works. Township Plats showing line of ditch or canal.

[Printed blanks can be obtained from the State Engineer.]

Application No. .....

Water Division No. ....., District No. .....

Application for a Permit to Construct Drainage Works.

I, ...of
(Name of person signing application.)
...., County of
(City or village of which a resident.)
....., State of ....., being
(Name of County.) (State.)
duly sworn upon my oath, say:

1st.—That the name of the applicant is .....
...., Post-
(Individual owner, company or corporation.)
office address, No. .... Street,
(Number of street.)
....., County ....
(Name of postoffice.) (Name of county.)
State .....
(Name of State.)

2d.—That the name adopted for the proposed ditch or canal is
....
(Give name of ditch or canal, if any.)

3d.—That it is proposed to ..... the waters
(Drain, divert, or lower.)
of....., a lake situated in .....,
(Give name of lake or pond.) (Name of subdivision.)
of Section ....., Township ....., Range
....., of the 6th Principal Meridian.

4th.—That the surface area of said lake is ..... acres at low-water stage, with an average depth of ..... feet.

5th.—That the ditch leading from said lake will commence at the ..... side, and will be ..... miles in length, and pass through the following described lands, viz.:.....
....
and terminate in ....., of Section ....., Township .....,
Range ....., as shown by the accompanying township plats.

6th.—That the total territory drained by the proposed ditch covers an area of ..... acres.

7th.—That the dimensions of the proposed drainage ditch or canal will be as follows:

[Printed blanks can be obtained from the State Engineer.]

Location.	Depth.	Width at Bottom.	Width of Top.	Grade per mile.
At head	feet	feet	feet	
At ....mile	feet	feet	feet	feet.
At ....mile	feet	feet	feet	feet.
At ....mile	feet	feet	feet	feet.
At ....mile	feet	feet	feet	feet.

(Give dimensions at each point where change in size or grade is made stating miles from head.)

8th.—That the construction will begin on or before the .... day of ....., 19...

9th.—That the works will be completed on or before the .... day of ....., 19...

10th.—That the estimated cost of said proposed drainage works is as follows: ..... $....., ... $....., Total, $.....

11th.—That the relation which the subscriber to this affidavit bears to said proposed drainage works is that of*..... and that he is authorized to make this affidavit in behalf of the interests affected.

*.....

(*The party signing this application must be the applicant himself, attorney in fact, partner, president or some person having absolute authority to sign for his principal.)

State of Nebraska,
County of.....,—ss.

I hereby certify that the foregoing application was signed in my presence and sworn to before me by ....., this .... day of ....., 19..

....., Notary Public.

State of Nebraska,
Office State Board of Irrigation,—ss.

This is to certify that the foregoing application has been examined ....
....

STATE BOARD OF IRRIGATION,

....., State Engineer, Secretary.

.....

[Printed blanks can be obtained from the State Engineer.]

This is to certify that the foregoing application has been examined and is hereby granted subject to the following limitations and conditions:

1st. The work of excavation or construction shall begin on or before ....., 19...

2d. The time for completing the work shall extend to ....., 19...

....

....

STATE BOARD OF IRRIGATION,

.....,

State Engineer, Secretary.

Approved ....., 19...

(Indorsed:) No. ..... Division No. ....., District No. ..... Application for a Permit to Construct Drainage Works. State of Nebraska, Office State Board of Irrigation,—ss. This instrument was filed for record at .... o'clock, ... noon, on the .... day of ....., 1...., and duly recorded in Book ....., on page ...., State Engineer, Secretary.

NOTE.—This application, if approved, must be followed within six months by a map or plat on a scale of not less than two inches to the mile, showing the location of the works and the course of the ditch.

Township Plats—Showing Course of Canal and Location of Lake.

The following township plats, ... in number, show
(No. filled out.)
where the ditch canal heads, and where it crosses each quarter section of land along the line of its course and the location of lake to be drained.

.....,

Signature of Person Signing Application.

NOTICE.—The blanks for No. of Township, Range, etc., at top of blank plats, must be properly filled out. Plat No. 1 should be used in which to locate the head of the canal and lake, and Plats No. 2, No. 3, etc., must be used in their order for each successive township into which the canal enters. All tracing, lettering, etc., must be done in ink, free from blurs or blots. If four blank plats are not sufficient to show the entire line of the canal, a special additional blank will be furnished free of charge, upon application to the office of the State Board.

[See township plat, p. 1767, *infra*.—THE AUTHOR.]

[Printed blanks can be obtained from the State Engineer.]

Claim No. ....., Priority No. .....

Water Division No. ...., District No. .....

(The above to be filled out at the office of Board.)

Claim for the Waters of the State of Nebraska.

I, ... of the
(Name of person signing claim.)
....., County of .....,
(City or village of which a resident.) (Name of county.)
State of ..... being duly sworn, upon
(Name of State.)
my oath say:

1st.—That the name of the claimant is .....
....., Postoffice address,
(Name of person or company for whom claim is made.)
No. ..... Street, ...
(Number and street.) (City or village.)
.....: County, ...
(County.) (State.)

2d.—That the water is claimed for the purpose of .....
.....
(State the purpose for which water is claimed.)

3d.—That the name adopted for the ditch or canal is the .....
.....
(Name of ditch or canal.)

4th.—That the source of the appropriation claimed is .....
.....
(Name of creek or river from which water is claimed.)

5th.—That the amount of the appropriation claimed is .....
..... cubic feet per second of time.
(Number of cubic feet.)

6th.—That the headgate is located on the .....
(North, south, east, or west.)
bank of the stream, in .....,
(Describe lot or forty acres in which situated.)
of Section ....., Township ....., Range .....,
(Number.) (Number.) (Number, east or west.)
of the ..... Principal Meridian.
(Number.)

[Printed blanks can be obtained from the State Engineer.]

7th.—That the said ditch or canal, ... miles in length,
(Number of miles.)
passes through the following sections of land, as shown on the accompanying township plats, viz.:

....
(Describe each section through which canal passes, stating township and range.)

(a) That the portion of said ditch or canal, ... miles
(Number of miles.)
in length, indicated on said plats by a black line is completed.

(b) That the portion of said ditch or canal, ... miles
(Number of miles.)
in length, indicated on said plats by a red line is not completed.

8th.—That the dimensions of said ditch or canal are (and will be for the uncompleted portions) as follows:

Headgate—width in clear ..... feet; depth of water on
(Number of feet.)
floor at low water, ... feet.
(Depth in feet.)

Canal or Ditch.

Location.	Depth.	Width on Bottom.	Width on Top.	Grade per mile.
Below headgate.....	feet	feet	feet	feet.
At ..... mile	feet	feet	feet	feet.
At ..... mile	feet	feet	feet	feet.
At ..... mile	feet	feet	feet	feet.
At ..... mile	feet	feet	feet	feet.
At ..... mile	feet	feet	feet	feet.
At ..... mile	feet	feet	feet	feet.

(Give dimensions at each point where reduced in size, stating miles from headgate.)

9th.—That the total excavation amounts to ..... cubic
(Number of yards.)
yards of material, consisting of .....
.....
(State character of material, whether rock, boulders, sand, clay, etc.)
and that the total length of fluming required is .....
(Number of feet.)
feet.

(a) That the material thus far removed amounts to .....
..... cubic yards.
(Number of yards.)

(b) That the fluming completed amounts to ..... feet.
(Number of feet.)

[Printed blanks can be obtained from the State Engineer.]

10th.—That the estimated cost of said ditch or canal is as follows: Earthwork, $..... Fluming, $..... Headgate, $..... Other expenses, $..... Total, $.....

(a) That the expenditures thus far incurred are as follows: Earthwork, $..... Fluming, $..... Headgate, $..... Other expenses, $..... Total, $.....

11th.—That it is the intention that the said ditch or canal shall supply water to irrigate the following sections or quarter sections of land, viz.: .....,

(Give sections and quarter sections, stating number township and range.)

amounting in all to ..... acres.

(Total number of acres.)

12th.—That the actual work of excavation and construction was begun on the .... day of ..... 1...., and the works ..... completed, and the appropriation perfected on or

(Were or will be.)

before the .... day of ..... 1....

(a) That this claim is made, under and by virtue of rights deemed to have been acquired by .....

.....

(State whether by application of water to a beneficial use without objection, or by posting notice and filing same with County Clerk, as prescribed by law. If by use, state nature, date of commencement, and period of duration; if by filing, state date of posting notice, date of record and where recorded.)

(b) That water ..... turned into said ditch or canal

(Was, or will be.)

on or before the .... day of ....., 1.....

13th.—That the time estimated as necessary to provide for the application of the amount of water herein claimed to the beneficial use above stated, is ..... years from April

(State number of years.)

4, 1895.

(c) That there were ..... acres of crops actually

(Number of acres.)

irrigated from said ditch or canal during 1....

(d) That it is estimated that there will be .....

(Number of acres.)

acres of crops irrigated from said ditch or canal during 1....

14th.—That the relation which the subscriber to this affidavit bears to said ditch or canal, or other work, is that of.....

....,

(State whether owner, manager, superintendent, etc.)

[Printed blanks can be obtained from the State Engineer.]

and that he is authorized to make this affidavit in behalf of the interests affected.

.....
(Signature.)

State of .....,
County of .....,—ss.

I hereby certify that the foregoing claim was signed in my presence and sworn to before me by ....., this .... day of ....., 1....

[Seal] .....,
Notary Public.

NOTICE.—The above claim affidavit must be signed and sworn to by some person closely related in interest (or having authority, delegated or otherwise, to make affidavit) to the ditch, canal, or other work in question; preferably by the owner or president, secretary, or manager of the company controlling same.

Too much care cannot be exercised in the preparation of this affidavit, as it is the foundation for all additional testimony that will be taken (upon the ground) by under secretaries, to complete the record from which the Board will determine the rights and priority of the claimant. Therefore, generalities must be avoided, and all facts required carefully determined and accurately stated.

This affidavit must be filed at the office of the State Board of Irrigation within.....days from.....1... Delay and neglect will jeopardize the rights of claimants.

Proposed extensions and enlargements of canals, ditches, or other works, not protected by new filings made previously to April 4, 1895, must not be included in the above claim. Individuals or corporations, desiring to make such extensions or enlargements, must make application for a permit from the State Board, as provided by the statute now in force.

STATE BOARD OF IRRIGATION,
.....,
State Engineer, Secretary.

(Indorsed:) Claim No. ....., Priority No. ....., Division No. ....., District No. ..... Claim for the Waters of the State of Nebraska. State of Nebraska, Office State Board of Irrigation,—ss. This instrument was filed for record at .... o'clock, ... noon, on the .... day of ....., 19.., and duly recorded in Book .... of the Record of Claims for Appropriations, on page ...., State Engineer, Secretary.

Township Plats—Showing Line of Ditch or Canal.

The following township plats, ...(No. filled out.)..... in number, show where the said ditch or canal heads, and where it crosses each quarter section of land along the line of its course.

.....,
Signature of person signing application.

[Printed blanks can be obtained from the State Engineer.]

NOTICE.—The blanks for No. of Township, Range, etc., at top of blank plats, must be properly filled out. Plat No. 1 should be used in which to locate the head of the canal, and Plats No. 2, No. 3, etc., must be used in their order for each successive township into which the canal enters. All tracing, lettering, etc., must be done in ink, free from blurs or blots. If four blank plats are not sufficient to show the entire line of the canal, a special additional blank will be furnished free of charge, upon application to the office of the State Board.

[See township plat, p. 1767, *infra*.—THE AUTHOR.]

Proof of Appropriation of the Waters of the State of Nebraska.

Application No. ....., Water Division No. .....

From ....., in ..... ¼ .....¼, Sec. ....., T. ..... N., R. ....., ... County, Nebraska.

1. Q. State your name, postoffice address, County and State.
   A. .....
2. Q. What interest have you in the canal or ditch built under Application No. .....?
   A. .....
3. Q. How did you acquire such interest?
   A. .....
4. Q. What transfers have been made, if any, in the ownership of the canal?
   A. .....
5. Q. Have such transfers been recorded in the office of the State Board of Irrigation?
   A. .....
6. Q. What is the length, cross-sectional dimensions and gradient of the main canal?
   A. Length ..... Width at top of water ..... Width of bottom..... Depth of water ..... Fall in feet per mile .....
7. Q. When was the work of excavation completed on the main canal?
   A. .....
8. Q. Have you a headgate which can be closed and securely locked, and also a measuring flume so that the flow of water in this canal can be measured and regu-

[Printed blanks can be obtained from the State Engineer.]

lated by the officers of the State Board of Irrigation?

A. .....

9. Q. Is the present site of the headgate the same as originally located, and if not, under what authority was it moved?

A. .....

10. Q. What is the total length of laterals now constructed?

A. .....

11. Q. Describe the land irrigated, giving the irrigated area of both cultivated and uncultivated land in each legal subdivision.

.....

12. Q. If all the land enumerated in the original application is not irrigated, give reason why.

A. .....

13. Q. Has there been sufficient water each year since water has been applied? If not, state when scarcity occurred, and give reason why.

A. .....

14. Q. Has there ever been filed in the office of the State Board of Irrigation a map as required by law and according to the rules and regulations of the State Board of Irrigation?

A. .....

15. Q. Show on the accompanying blank plat the land actually irrigated in each forty-acre subdivision, or fractional part thereof, by carefully shading the same in red.

State of Nebraska,
..... County,—ss.

....., being first duly sworn, deposes and says that the answers to the foregoing questions are according to his dictation; that he has read and knows the purport of said questions and answers, and that said answers with all the dimensions, areas, and descriptions are true, and that the accompanying plat correctly shows the land actually irrigated under Application No. .....

.....

[Printed blanks can be obtained from the State Engineer.]

Subscribed in my presence and sworn to before me this .... day of ....., 19...

....., Notary Public,

State of Nebraska,
..... County,—ss.

..... and ....., being first duly sworn, each for himself deposes and says that he is well acquainted with the land irrigated under the ..... Application No. .....; that he has read the foregoing proof of appropriation and that the answers to the questions therein are true and that the accompanying plat correctly shows the land irrigated.

.....
.....

Subscribed in my presence and sworn to before me this .... day of ....., 19...

....., Notary Public.

Proof of Appropriation of the Waters of the State of Nebraska for Power.

Application No. ....., Water Division No. .....

From ...., in ..... ¼ ..... ¼, Sec. ....., T. ..... N., R. ....., ... County, Nebraska.

1. Q. State your name, postoffice address, County and State.
   A. .....
2. Q. What interest have you in ....., built under Application No. .....?
   A. .....
3. Q. How did you acquire such interest?
   A. .....
4. Q. What transfers have been made, if any, in the ownership of the canal?
   A. .....

[Printed blanks can be obtained from the State Engineer.]

5. Q. Have such transfers been recorded in the office of the State Board of Irrigation?

A. .....

6. Q. What is the length, cross-sectional dimensions and gradient of the main canal?

A. Length ..... Width at top of water ..... Width bottom ..... Depth of water ..... Fall in feet per mile .....

7. Q. When was the work completed?

A. .....

8. Q. Have you a headgate which can be closed and securely locked, and also a measuring flume, so that the flow of water in this canal can be measured and regulated by the officers of the State Board of Irrigation?

A. .....

9. Q. Is the present site of the headgate or dam the same as originally located, and if not, under what authority was it moved?

A. .....

10. Q. What is the total head and volume of water used, horse-power developed and daily product of the plant?

A. .....

11. Q. Describe the plant fully and in detail.

.....

12. Q. If all the improvements enumerated in the original applications are not built, give reason why.

A. .....

13. Q. Has there been sufficient water each year since water has been applied? If not, state when scarcity occurred, and give reason why.

A. .....

14. Q. Has there ever been filed in the office of the State Board of Irrigation a map as required by law and according to the rules and regulations of the State Board of Irrigation?

A. .....

15. Q. Show on the accompanying blank plat a sketch of your improvements with the legal subdivisions of land they occupy.

[Printed blanks can be obtained from the State Engineer.]

State of Nebraska,
.....County,—ss.

..... being first duly sworn, deposes and says that the answers to the foregoing questions are according to his dictation; that he has read and knows the purport of said questions and answers, and that said answers with all the dimensions, areas and descriptions are true, and that the accompanying plat correctly shows ..... under Application No. .....

.....

Subscribed in my presence and sworn to before me this .... day of ....., 19...

....., Notary Public.

State of Nebraska,
.....County,—ss.

..... and ....., being first duly sworn, each for himself deposes and says that he is well acquainted with ....., Application No. .....; that he has read the foregoing proof of appropriation and that the answers to the questions therein are true, and that the accompanying plat correctly shows

.....

.....

.....

Subscribed in my presence and sworn to before me this .... day of ....., 19...

....., Notary Public.

United States of America.

State of Nebraska.

Certificate No. ....., Division No. .....

Office of State Board of Irrigation.

Certificate of Appropriation of Water.

This is to certify that .....:, of ....., State of ....., ha.. appropriated water from ....., to be used

[Printed blanks can be obtained from the State Engineer.]

through the ..... for ....., and that the State Board of Irrigation, under the provisions of article 2, of the Irrigation Law of the State of Nebraska, has determined and established the priority and amount of the said appropriation, as follows:

The priority of the appropriation dates from .....; the priority for the watershed is No. ....., and the priority for the stream is No. 3.

The amount of the appropriation is ..... cubic feet per second; the amount of prior appropriation from the watershed is ..... cubic feet per second, and the amount of prior appropriation from the stream is ..... cubic feet per second. The lands to be irrigated are .....

The right to water herein confirmed is restricted to the irrigation of the above-described land.

The amount of the appropriation shall not exceed the amount herein stated; neither shall it exceed the capacity of said ditch or canal, nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry; and, further, said appropriation is limited to one-seventieth (1/70) of a cubic foot per second of time for each acre of the above-described land to which water is actually and usefully applied for irrigation.

I, ..., President of the State Board of Irrigation of the State of Nebraska, have hereunto set my hand this .... day of .....

.....,
President.

Attest:

.....,
Secretary.

(Indorsed:) Certificate No. ....., Division No. ..... State of Nebraska, Office State Bd. Irr.,—ss. Recorded in Book .... of the Record of Certificates of Appropriation, on page ...., State Engineer, Secretary. State of Nebraska, ... County,—ss. Filed for record this .... day of ....., 19.., and duly recorded in book .... of the Record of Certificates of Appropriation, on page ...., ..., County Clerk.

[Printed blanks can be obtained from the State Engineer.]

(3d ed.)

§ 1464. NEVADA FORMS.

(1911.)

Application for permit to appropriate the public waters of the State of Nevada.

Notice of application for permission to appropriate the public waters of the State of Nevada.

Proof of application of water to beneficial use.

Proof of the appropriation of water.

Application for permission to change the point of diversion, manner of use, point of use.

Certificate of appropriation of water.

Serial No. .....

Application for Permit to Appropriate the Public Waters of the State of Nevada.

Date of first receipt and filing in State Engineer's office, ...

Returned to applicant for correction, ...

Corrected application filed, ...

The undersigned, ..., of ....., County of
(Name of applicant.)
....., State of ....., hereby make.. application for permission to appropriate the public waters of the State of Nevada, as hereinafter stated. (If applicant is a corporation give date and place of incorporation.).....

1. The source of the proposed appropriation is.....
.....
(Name of stream, lake, or other source.)

2. The amount of water applied for is .....
.....second-feet.
(One second-foot equals 40 miner's inches.)

3. The water to be used for .....
.....
(Irrigation, power, mining, manufacturing, domestic, or other use.)

4. The water is to be diverted from its source at the following point: .....
(Describe as being within a forty-acre subdivision of public survey, or by course and distance to a section corner. If on unsurveyed land it should be so stated.)

If the water is to be used for irrigation, supply the following information:

[Printed blanks can be obtained from the State Engineer.]

(a) Number of acres to be irrigated is .....

(b) Description of land to be irrigated .....

.....

(Describe by legal subdivisions, or if on unsurveyed land it should be so stated and a description provided in accordance with special instruction from the State Engineer when application is returned for correction.)

(c) Irrigation will begin about ..... (Month.) and end about

....., of each year.
(Month.)

If water is to be used for power, mining, transportation, or other use, supply the following information:

(d) Power to be developed is ..... horse-power.

(e) Works to be located .....

(Give 40-acre subdivision on which works will be located, or locate by course and distance to a section corner.)

(f) Point of return of water to stream .....

.....

(Describe in same manner as point of diversion.)

(g) Remarks .....

Description of Proposed Works.

(State manner in which water is to be diverted, whether by dam or other works, whether through pipes, ditches, flumes, or other conduits. If water is to be stored in reservoirs it should be so stated and the location of the reservoir should be given with reference to the legal subdivisions.)

5. Estimated cost of works .....

6. Estimated time required to construct works .....

7. Remarks .....

(For use of applicant.)

....., Applicant.

By .....

APPROVAL OF STATE ENGINEER.

This is to certify that I have examined the foregoing application, and do hereby grant the same, subject to the following limitations and conditions:

.....

The amount of water to be appropriated shall be limited to the amount which can be applied to beneficial use, and not to exceed ..... cubic feet per second.

Actual construction work shall begin on or before .....

[Printed blanks can be obtained from the State Engineer.]

Proof of commencement of work shall be filed before .....

Work must be prosecuted with reasonable diligence and be completed on or before .....

Application of water to beneficial use shall be made on or before .....

Proof of the application of water to beneficial use must be filed with the State Engineer on or before .....

Witness my hand and seal this .... day of .....

....,

State Engineer.

(Indorsed:) No. ..... Application for Permit to Appropriate Water. State of Nevada, Engineer's Office. Filed ..... Applicant ..... P. O. Address.

Application No. .....

Notice of Application for Permission to Appropriate the Public Waters of the State of Nevada.

Notice is hereby given that on the .... day of ....., 190.., in accordance with section 25, chapter XVIII, of the Statutes of 1907, one ....., of ....., County of ..... and State of ....., made application to the State Engineer of Nevada for permission to appropriate the public waters of the State of Nevada. Such appropriation is to be made from ....., at points ....., by means of ....., and ..... cubic feet per second is to be conveyed to points ....., by means of ....., and there used .....

Water to be returned to stream at .....

Date of first publication .....

Date of last publication .....

Signed: ....,

State Engineer.

Proof of the publication of this notice must be filed with the State Engineer within 90 days from the above date, or the application will be declared void.

[Printed blanks can be obtained from the State Engineer.]

Under Permit No. .....

Proof of Application of Water to Beneficial Use.

Deposition of Holder.

Question 1. State your name, occupation, and postoffice address.

Ans. .....

Ques. 2. If acting in behalf of a corporation, state its name, place of business, and your authority for applying in its behalf.

Ans. .....

Ques. 3. State number and date of permit, source of water supply, and location of point of diversion.

Ans. .....

Ques. 4. Give name of canal or other works by which water is conducted to its place of use, and state the amount such works are capable of carrying.

Ans. .....

Ques. 5. State for what purpose water is used, and at what point. (If for irrigation, name each subdivision in which used, and number of acres in each subdivision that have actually been irrigated with said water.)

Ans. .....

Ques. 6. What is the minimum required for the use specified above?

Ans. .....

Ques. 7. If you are not the person or representative of the corporation to whom the above-mentioned permit was originally issued, please state how ownership was acquired by present holder.

Ans. .....

Ques. 8. State when, how, in what amount, and to what extent, the water diverted under the above-mentioned permit has been used.

Ans. .....

Signed: .....

I hereby certify that the foregoing testimony was read to the above subscriber before its signing, and I believe him to be the person he represents himself to be, and that said testimony was subscribed and sworn to before me at my office in ....., County

[Printed blanks can be obtained from the State Engineer.]

of ....., State of ....., on this .... day of ....., A. D. 19...

.....

I have examined the within testimony and the within described premises and find the holder's claim to his use of water to be in accordance with the facts to the best of my knowledge and belief.

....., State Engineer.

(Indorsed:) Under Permit No. ..... Proof of Application of Water to Beneficial Purposes. Deposition of Holder. Amount of water ..... Source ..... County ..... Purpose ..... Place of use ..... Date of priority..... Received and filed.....

Proof of the Appropriation of Water.

.....

State your name.....

1. Q. Postoffice.
   A. .....
2. Q. State the use to which the water has been applied.
   A. .....
3. Q. State the means of diversion employed.
   A. .....
4. Q. If through a ditch state its name.
   A. .....
5. Q. (a) State date of survey of the ditch or other distributing works through which the water claimed is diverted. (b) The date when the construction of such ditch was begun and when completed.
   A. (a).....
   (b).....
6. Q. If any enlargements were made, state the date when begun and the date when completed.
   A. .....
7. Q. State dimensions of the ditch as originally constructed, and as enlarged.
   A. .....

[Printed blanks can be obtained from the State Engineer.]

8. Q. State the name of person, association of persons or corporation who built the ditch or canal, and the name or names of its present owners.

A. .....

9. Q. State the nature of your title to the land for which an appropriation is claimed, and if not owned by you give the name of the owner and the nature of the possessory right which you exercise.

A. .....

10. Q. State the year when water was first used for irrigation or other beneficial purposes, and by whom. If for irrigation, give the number of acres watered the first year, with the legal subdivisions on which the water was used, and as near as may be the acres irrigated in each legal subdivision.

A. .....

11. Q. State the number of acres watered each subsequent year, and give the legal subdivisions on which the water was used, and as near as may be the acres irrigated in each legal subdivision.

A. .....

12. Q. If water is claimed for irrigation, give the legal subdivisions of land owned or controlled by you for which an appropriation is claimed.

A. .....

13. Q. State the acreage said ditch is capable of watering, give the legal subdivisions of land which it can be made to irrigate, and state who owns said land.

A. .....

14. Q. State the character of the soil and the kind of crops cultivated.

A. .....

15. Q. Are you an owner in said ditch? If so state your proportionate interest therein.

A. .....

16. Q. The plat prepared by the State Engineer is hereby accepted as showing correctly the location of the ..... Ditch and the land which can be irrigated therefrom.

A. .....

[Printed blanks can be obtained from the State Engineer.]

17. Q. When does your irrigation season begin and when does it end?

A. .....

18. Q. If water is used for other purposes than irrigation, state the nature of such use, the time when such use began, and how much water is required for such purpose.

A .....

19. Q. During what months is the water used?

A. .....

20. Q. Have you had sufficient water each year since the use for which an appropriation is claimed began? If not, state the years of scarcity, the months when the supply was insufficient, and the reason of such scarcity.

A. .....

Signed: .....

....., Nevada, ..., 19...

Sworn to and subscribed before me at ....., this .... day of ....., 19...

.....,
Notary Public.

Remarks: .....

(Indorsed:) Proof of Appropriation. Date of appropriation, ... Priorities: General, ... Stream, ... Name of stream, ... Tributary of ..... Name of claimant, ... Filed in this office this .... day of ....., 19... ....., State Engineer.

No. .....

Application for Permission to Change the Point of Diversion, Manner of Use, Point of Use.

To the Honorable State Engineer of the State of Nevada, Carson City, Nevada:

The undersigned, ..., whose postoffice address is ....., County of ....., State of ....., hereby makes application to the Honorable State Engineer for permission to

[Printed blanks can be obtained from the State Engineer.]

change the ..... of the waters of ....., in said ..... County, which have been heretofore appropriated and used by him as hereinafter stated, and in that behalf shows:

First.—That your applicant and his predecessors in interest have for over ..... years, next last past, beneficially used and appropriated all of the waters of said ....., ..., and during all of said period have by means of dams and ditches, conveyed all of said waters upon lands occupied, possessed and cultivated by them and there used the same for the purpose of irrigation on said lands, and for raising crops of grain and other farm products thereon.

Second.—That said lands so possessed, cultivated and irrigated by them are situated along and near ....., and, as nearly as can be ascertained, are in ....., and the points of diversion at which said waters have been so diverted by said dams and ditches are situated along said ....., in said subdivisions.

Third.—That said ..... runs over and across the .....

Fourth.—That the said user of said waters by applicant and his predecessors have, during all of said period of over ..... years, been open, notorious, under claim of right, adversely to all the world, and prior to all persons, and that applicant now has and owns the exclusive prior right to the use of all of the waters of said .....

Fifth.—That applicant desires to change his ..... of the waters of said ....., and to divert said waters at a point in the ....., and by means of dams, reservoirs, ditches and channels to convey said waters of said ....., and the whole thereof, being approximately ..... cubic feet per second, to and upon the following described lands:

.....

comprising ..... acres, and to there make use of all the said waters to irrigate the said last-mentioned lands and to raise crops of produce thereon.

Sixth.—That to accomplish said purpose, applicant has constructed a dam and reservoir in said ....., and has constructed ditches therefrom, for the purpose of conveying, and by means of which he desires to convey all of said waters across the ....., thence by ..... of ....., to ....., and thence by ..... and ditches to be constructed therefrom to

[Printed blanks can be obtained from the State Engineer.]

convey all of said waters to and upon the lands described in paragraph ..... above.

Wherefore, your applicant prays that such change in the ....., and ....., and in the description thereof, may be authorized by the Honorable State Engineer, and that said officer take such measures respecting publication and other matters relating thereto as may be required by the statutes in such case made and provided.

.....

By .....,

Attorney for .....

State of.....,

County of.....,—ss.

I, ..., being first duly sworn, deposes and says: That he is a citizen of the United States of America, over the age of twenty-one years, and is the applicant whose name is subscribed to the foregoing application for change of ..... of the waters of the .....; that he has read the foregoing application and knows the contents thereof and that the same is true.

.....

Subscribed and sworn to before me this .... day of ....., A. D. 19...

.....,

Notary Public in and for the County of....., State of Nevada.

My commission expires ....., 19...

APPROVAL OF STATE ENGINEER.

The number of this permit is .....

Date of receipt of first application ....., 19...

Return to applicant for correction....., 19...

Corrected application received....., 19...

Publication of notice completed....., 19...

Recorded in Book ...., page .....

Approved ....., 19...

This is to certify that I have examined the within application for a permit to appropriate the public waters of the State of Nevada, and hereby grant the same, subject to the following limitations and conditions:

[Printed blanks can be obtained from the State Engineer.]

The amount of water to be appropriated not more than ..... cubic feet per second.

The construction of the within described works to be commenced not later than .....

One-fifth of the work above specified to be completed on or before .....

The whole of said work to be completed on or before .....

The time for the proof of beneficial use of water appropriated in accordance herewith, to extend to .....

Witness my hand this .... day of ..... 19...

....,

State Engineer.

Certificate of Appropriation of Water.

Certificate Record ...., Page .....

Whereas, ... has presented to the State Engineer of the State of Nevada proof of appropriation of water from ....., through the ..... Ditch for irrigation of the lands herein described, lying and being in ..... County, Nevada, and for .....

Now know ye, that the State Engineer, under the provisions of section 13, chapter 4, Statutes of Nevada, 1903, has determined the priority and amount of such appropriation as follows:

Name of appropriator, ...; postoffice address, ..., Nevada; general priority number on main stream, ...; priority number on .....; amount of appropriation, ... acre-feet per year; amount of prior appropriations, ... acre-feet per year; date of appropriation, ...; description of land to be irrigated, and for which this appropriation is determined. .....

The right to water hereby determined is limited to irrigation ....., and the use is restricted to the place where acquired and to the purpose for which acquired; rights for irrigation not

[Printed blanks can be obtained from the State Engineer.]

to exceed three acre-feet per year for each acre of land for which appropriation is herein determined .....

In testimony whereof, I, ..., State Engineer, have hereunto set my hand this .... day of ....., A. D. 19...

....., State Engineer.

[Printed blanks can be obtained from the State Engineer.]

(3d ed.)

§ 1465. NEW MEXICO FORMS.

(1911.)

(In addition to the following forms, a pamphlet of instructions is issued similar to that of Colorado, containing requirements for maps and specifications, and statement of fees.—THE AUTHOR.)

Application for permit to appropriate the public waters of the territory of New Mexico.

Approval of Territorial Engineer.

Territorial Engineer's instructions and explanations for filling out application blanks.

Bond.

Notice of application for permit.

Certificate of construction.

License to appropriate water.

Read Instructions Before Filling the Blanks.

Maps Must Accompany This Application.

Application for Permit to Appropriate the Public Waters of the Territory of New Mexico.

No. .....

1. Date of receipt of application.....
2. Name of applicant .....
   Postoffice address, ...County of ....., Territory of New Mexico.
3. If applicant is a corporation, give
   (a) Date and place of organization of corporation.....
   (b) The amount of capital stock, $.....
   (c) The amount paid in $.....
   (d) The names and addresses of directors .....
4. Quantity of water claimed ..... sec. ft.
   (a) By diversion .....sec. ft
   (b) Storage of flood waters .....ac. ft.
   (c) .....
5. Periods of annual use ..... sec. ft. from ..... to ..... sec. ft. from ..... to .....

[Printed blanks can be obtained from the State Engineer.]

6. Source of water supply:

(a) Name .....

(b) Which is a tributary of .....

7. Location of point of diversion ....., Section ....., Township ....., Range .....

(If on unsurveyed land describe fully.)

.....

8. To be used for .....

Irrigation and Domestic Use:

(a) Number of acres to be irrigated .....acres.

(b) In the following legal subdivisions .....

Manufacturing, Mining and Power Purposes:

(a) To be used for .....

(b) Amount of power to be generated ..... horse-power.

(c) At what point .....

(d) At what point will water be returned.....

9. Estimated cost of work, $.....

10. Description of work for diversion .....

Dimensions of Storage Works:

(a) Height of dam .... feet; length of dam at top ..... feet; length of dam at bottom ..... feet; material used in connection (wood, earth, stone, or concrete)...

(b) Capacity of reservoir ..... ac. ft.

Dimensions of Canal or Ditch:

(a) Size of headgate—width ..... ft.; height ..... ft.

(b) Canal is ..... width at bottom ..... ft.; width at water line ..... ft.; depth ..... ft. Average grade per 1,000 ft. is ..... ft.

Length of main canal is ..... miles and across the following sections:.....

11. Other reservoirs and canals, name or number, location and size and capacity of each.....

12. Reference .....

(Give name of bank and merchant reference.)

I, ..., do solemnly swear that the statements and answers to questions in this application are true to the best of my knowledge.

Claimant, ...

[Printed blanks can be obtained from the State Engineer.]

Subscribed and sworn to before me this .... day of ....., 191...

.....,
Notary Public.

(Approved by the Board of Water Commissioners, May 7, 1907.) Fee of five dollars and maps required by law to accompany this application.

APPROVAL OF TERRITORIAL ENGINEER.

The number of this permit is..... ....
Date of receipt of first application....., 19....
Return of map, application for correction....., 19....
Corrected map, application received....., 19....
Publication ordered....., 19... Paper.....
Publication of notice completed and proof filed....., 19....
Application recorded in Book ....., page.....
Approved ....., 19....

This is to certify that I have examined the within application for a permit to appropriate the public waters of the Territory of New Mexico, and hereby approve the same.

The Amount of Water to be Appropriated.

(a) ..... cubic feet per second; (b) By storage ..... acre-ft. (c) Remarks ....

The construction of the within described works to be commenced not later than .....

One-fifth of the work above specified to be completed on or before .....

The whole of said work to be completed on or before .....

The time for application to beneficial use shall not be later than .....

Witness my hand this .... day of ....., 19...

.....,
Territorial Engineer.

(Application should be recorded in office of County Probate Clerk.)

(Indorsed:) Permit No. ..... Application for Permit to Appropriate the Public Waters of the Territory of New Mexico. Name ..... P. O. address ..... Quantity appropriated ..... From ..... For ..... Location of Point of Diversion. Section ...., Township ...., ..., Range ..... Ap-

[Printed blanks can be obtained from the State Engineer.]

plication received ..... Approved ..... Recorded in Book ...., page ..... Final application to beneficial use of water appropriation in accordance with this permit.

Territorial Engineer's Instructions and Explanations for Filling Out Application Blanks.

READ CAREFULLY.

Sec. 1. Do not fill in section one. This blank is left for the Engineer.

Sec. 2. Plainly fill in the name of the applicant and address.

Sec. 3. If applicant is a corporation, company or firm, plainly fill out blanks under section three. Give date of filing certificate of incorporation in office of Secretary of Territory of New Mexico.

Sec. 4. Quantity of water claimed should be the total amount in cu. ft. per sec. to be beneficially used during the average periods of annual use. This amount cannot be in excess of 1 sec. ft. for 70 acres. One sec. ft. running eight months would cover 70 acres nearly 7 ft. deep. The amount of water sufficient to cover the ground 2¼ ft. deep is generally considered plenty if beneficially used, therefore one sec. ft. would be sufficient to irrigate 100 to 200 acres. If all of this water is purely diversion then the same amount should be filled in the blank space after (a); also state under (c) how the works are to be used.

If the water asked for is flood water or unappropriated winter flow, etc., and has to be stored, then you should fill in under (b) the total capacity of the storage reservoirs, also under (c) state how many times the reservoirs will be filled during the year and at what times. (For example: Reservoirs are to be filled twice during the year, once from the winter flow of the river and once from floods and summer rain.) The amount of one sec. ft. of water running for 24 hours would equal about 1.98 ac. ft., therefore one sec. ft. running eight months would equal about 475 ac. ft.; in this way you can calculate how much storage water would equal a certain number of sec. ft. during an irrigation season of eight months, and place that amount as the quantity of water claimed. Then also under (c) state the maximum amount of water in cu. ft. per sec. you intend to divert when the water is diverted from the source of water supply to the reservoir or if the reservoir is formed by a dam across the water supply or stream then the maximum amount of water in cu. ft. per sec. you intend to store should be stated, which could be the maximum flow of unappropriated water in the water supply up to the capacity of your appropriation.

If the water claimed in both diversion for water used without storage water, then fill out all blanks according to instructions. The quantity of water claimed would then be the total of the water claimed under storage (as calculated by the above instructions) and water claimed by diversion.

Sec. 5. Is the place for the periods of annual use. Irrigation period averages in this Territory from some time in March to some time in October. Then in filling out sec. ft. from, say March 31st to October 18th. In some cases where there is a little water used beneficially during the winter months you will fill out in the second place for periods of annual use the number of sec. ft. from, say October 15th to March 31st. Remember these periods are for the use and not the periods that you are to store water in a storage proposition.

Sec. 6. Fill out plainly each blank under this section.

[Printed blanks can be obtained from the State Engineer.]

Sec. 7. The point of diversion in a purely diversion proposition is the point where the canal takes the water out of the river, arroyo or water supply, and is also the same in a storage proposition where the water is diverted by canal to the reservoir, but where the reservoir is formed by a storage dam across the water supply then the point of diversion is at the outlet of said reservoir.

If on unsurveyed lands describe the above location fully.

Sec. 8. State all the purposes for which the water is to be used. If for irrigation state under (a) the total number of acres to be irrigated, under (b) the location of land to be irrigated; if for mining, or power purposes fill out blanks for that purpose. Where same water is to be used for several purposes, fill out all blanks referring to the different purposes.

Sec. 9. State estimated cost of work.

Sec. 10. Describe works of diversion fully.

If the proposition has a diverting canal which diverts into a reservoir and from there into a distributing canal, fully describe diverting canal in first blank in section 10, giving section, grade and capacity of diverting canal, dimension of headgate, and if there is a little diversion dam describe that also, giving maximum height and length and material used in construction.

Under dimension of storage works if your proposition has a storage reservoir, fill out blanks left for such purposes. If there is more than one reservoir give the required data for reservoir No. 2 under Sec. 11.

Under dimensions of canal or ditch give the dimensions of your main distributing canal. If you have more than one main distributing canal put the required data of canal No. 2 also under Sec. 11.

Sec. 11. Is for other descriptions necessary to define the application and for remarks. Sec. 12 is to give a reference of some bank and merchant as to your ability to complete the works described in your application.

Claimant must sign affidavit to above statements before a notary or other officer qualified to administer oaths.

If the application is to enlarge an old proposition, fill out the blanks according to the enlarged project; then state under Sec. 11 give the required data necessary to define your old works.

Do not write in blanks left for the approval of the Engineer.

Bond.

KNOW ALL MEN BY THESE PRESENTS, That we, ..., as principal, and ..... and ....., as his sureties, are held and firmly bound unto the Territory of New Mexico in the sum of ..... Dollars, for the payment of which we bind ourselves, our heirs, executors, administrators and assigns firmly by these presents. Sealed with our seals and dated this .... day of ....., 19..

The condition of the foregoing obligation is such, that whereas, the above-bounden ..... has made application to Vernon L. Sullivan, Territorial Engineer, for a permit to appropriate water under the laws of the Territory of New Mexico for ..... purposes, as evidenced by his said application numbered .....

[Printed blanks can be obtained from the State Engineer.]

on file in the office of said Engineer, to which reference is had, and which is hereby made a part of this obligation.

NOW, THEREFORE, if any permit is granted to the above-named principal upon said application, and if said principal shall, in accordance with the terms of such permit to appropriate water, carry the construction of his proposed project to completion as required by said permit, then this obligation to be null and void, otherwise to remain in full force and effect.

..... [Seal]
..... [Seal]
..... [Seal]

Territory of New Mexico,
County of .....,—ss.

On this .... day of ....., 19.., before me, a ..... within and for said county, personally appeared ....., personally known to me to be the same persons whose names are subscribed to the foregoing bond, and each for himself acknowledged that he had executed the same for the uses and purposes therein expressed. And the said ....., surety, being by me first duly sworn, deposes and says that he is worth the sum of $..... over and above his just debts and liabilities and the amount by law exempt from execution, in property situated in the Territory of New Mexico, and described as follows:

.....

And the said ....., surety, being by me first duly sworn, deposes and says that he is worth the sum of $..... over and above his just debts and liabilities and the amount by law exempt from execution, in property situated in the Territory of New Mexico, and described as follows:

.....

WITNESS my hand and official seal the day and year last above written.

.....

I hereby approve the foregoing bond this .... day of ....., 19..

....., Territorial Engineer.

[Printed blanks can be obtained from the State Engineer.]

(Indorsed:) Bond. In the Matter of an Application for a Permit to Appropriate Public Water. Permit No. ..... Name ..... Address ..... Filed ..... Approved .....

May 4, 1910.

To the Attorneys, Civil Engineers, County Surveyors and General Public:

Gentlemen: Within the last three years there has been over four hundred applications for permits to appropriate the public waters of the Territory of New Mexico and in a great many cases applications have been filed which apparently were not for the purpose of developing the project but for speculative purposes or for the purpose of throwing clouds upon other permits to appropriate water from this same supply.

In view of the intention of the legislature in passing the Irrigation Act of 1907 in which it intended to promote real development and actual construction, this office has deemed it advisable to hereafter require a satisfactory bond as evidence of the ability of the applicant to carry his application to completion.

The *bona fide* developer will hail this new rule with approval for he is more protected in his application as the requiring of this bond will prevent to a large extent the filing of other applications for permits to appropriate water, which might be conflicting with his, for speculative purposes.

This rule has been established after very careful consideration of the great necessity of actual development in irrigation and power matters in this Territory.

The following rule which has been officially approved by the Board of Water Commissioners will hereafter be in effect as an appendix to our general printed rules and regulations.

Rule and Regulation.

Hereafter the Territorial Engineer will require with every application for a permit to appropriate water under the laws of New Mexico a satisfactory bond, to be approved by him, as evidence of the ability of the applicant to carry the construction to completion and upon failure to complete such project as required by the permit, if granted, the bond will be forfeited and the amount will be paid into the Hydrographic Survey Fund of the Territorial Treasury.

It is provided that no bond will be required when the application is for not more than 2 second-feet or five hundred acre-feet per annum.

The bond required for water filings for irrigation, power, mining and manufacturing purposes will be as follows:

For 2 to 5 second-ft. (cubic feet per second of time) or 500 to 1,500 acre-feet per annum, $250.00; 5 to 10 sec. ft. or 1,500 to 3,000 acre-feet per annum, $500.00; 10 to 20 sec. ft. or 3,000 to 6,000 acre-feet per annum, $1,000; 20 to 40 sec. ft. or 6,000 to 12,000 acre-feet per annum, $2,000; 40 to 75 sec. ft. or 12,000 to 25,000 acre-feet per annum, $3,500; 75 to 150 sec. ft. or 25,000 to 60,000 acre-feet per annum, $6,000; 150 to 300 sec. ft. or 60,000 to 125,000 acre-feet per annum, $8,000; 300 to 500 sec. ft. or 125,000 to 250,000 acre-feet per annum, $10,000; and all above this last-named amount, $15,000.

Bonds on applications for water for power, mining or manufacturing purposes only will be one-half as required for irrigation purposes.

In case such satisfactory bond be not filed within thirty days after the receipt of the application at the office of the Territorial Engineer, such application will be rejected.

Yours very truly,

VERNON L. SULLIVAN,
Territorial Engineer.

[Printed blanks can be obtained from the State Engineer.]

Notice of Application for Permit.

Santa Fe, New Mexico, ..., 19..

Mr. .....

Dear Sir:—

You are hereby instructed to publish the following notice in some newspaper of general circulation in the said ..... stream system, once a week for four consecutive weeks, and file proof of said publication with the Territorial Engineer before .... of ....., 19... Name of paper .....

....., Territorial Engineer.

Notice is hereby given that on the .... day of ....., 19.., in accordance with Section 26, Irrigation Law of 1907, ... of ....., County of ....., Territory of New Mexico, made application to the Territorial Engineer of New Mexico for a permit to appropriate from the Public Waters of the Territory of New Mexico.

Such appropriation is to be made from ....., at points ..... By means of ..... and ..... cu. ft. per sec., or ..... ac. ft., is to be conveyed to points .....
By means of.....
and there used for.....

The Territorial Engineer will take this application up for consideration on the .... day of ....., 19.., and all persons who may oppose the granting of the above application must file their objections with the Territorial Engineer on or before that date.

....., Territorial Engineer.

Certificate of Construction.

Certificate No. ..... Refers to permit No. .....

This is to certify, that I have inspected the works known as ....., which are located in Sec. ....., Twp. ....., Rng. ....., of the Territory of New Mexico and find that they have been properly and safely constructed and are in satisfactory condition.

[Printed blanks can be obtained from the State Engineer.]

The capacity of said works I find to be as follows:
Canal .....sec. ft. .....
Reservoir ..... acre-feet .....
Said works as constructed differ from the original plans as follows: .....
Which will limit the water-right from the original application as follows: .....

Witness my hand this .... day of ....., A. D. 19...

....,
Territorial Engineer.

(Indorsed:) No. .... Refers to Permit No. .... Certificate of Construction. Name ..... Address ..... Recorded in Book ...., page ...., Territorial Engineer's Office.

License to Appropriate Water.

Recorded in Book No. ...., page .... Refers to permit No. .....
Whereas, ..., has actually made application to beneficial use of ..... sec. ft. of water through ....., under Permit No. ....., for irrigation of the following described lands being in ....., County of ....., New Mexico, to wit:
.....
If for other purposes state for what:.....
Now, therefore, I, ..., Territorial Engineer under the provisions of the Irrigation Law of 1907, issue this license to ..... of ....., County of ....., New Mexico, to use the same for the above-stated purposes and can be changed only as provided by law.
Date of application for permit to appropriation was .... day of ....., 19..
In testimony whereof, I,....., Territorial Engineer of New Mexico, have hereunto set my hand this .... day of ....., A. D. 19...

....,
Territorial Engineer.

(Indorsed:) No. .... Refers to Permit No. ..... License to Appropriate. Name ..... Address ..... Recorded in Book ...., page ...., Territorial Engineer's Office.

[Printed blanks can be obtained from the State Engineer.]

(3d ed.)

§ 1466. NORTH DAKOTA FORMS.

(1911.)

Application for a permit to appropriate water within the State of North Dakota.
Application for a permit—Enlargement.
Notice of intention to appropriate water.
Proof of publication.

No. .....

Water Division No. ....., District No. .....

[Blanks to be filled by the State Engineer.]

Application for a Permit to Appropriate Water Within the State of North Dakota.

(NOTE.—Draw a line through items not applicable.)

1. Name of applicant.....
Postoffice address ....., County ....., State .....
I. If a corporation:
(a) Name of same.....
(b) Date and place of incorporation.....
(c) Amount of capital stock.....
(d) Amount paid in.....
(e) Names and addresses of directors:
.....

[NOTE.—A certified copy of articles of incorporation must accompany the application.]

II. Method of accomplishing the work and financial resources of the applicant:
(a) Method of accomplishing the work. (Whether by contract, employment of others, or by direct labor.) .....
(b) Cash on hand, $.....
(c) Treasury stock, $.....
(d) Bonds to be issued, $.....
(e) Other resources, $.....
2. Name of diversion works .....

[Printed blanks can be obtained from the State Engineer.]

3. Quantity of water claimed ..... cubic feet per second.
4. Source of water supply .....
5. Location of point of diversion.....
..... on .....bank.
(Right or left bank looking down stream.)
6. Annual period during which water is to be used.....
.....
7. To be used for:
I. Irrigation or domestic use:
(a) Number of acres to be irrigated..... acres.
(b) Legal subdivisions to be irrigated.....

[NOTE.—A list of lands to be irrigated, giving each subdivision and fraction with acreage thereof, should be written here, or may be appended as a part of this application. Same must be also be shown an accompanying map.]

(c) Statement as to domestic use (giving location, etc.)
.....
II. Mining, power, manufacturing, transportation, or other purposes:
(a) Nature of use.....
(b) Amount of power to be generated.....
horse-power.
(c) Location of plant.....
(d) Method of developing power .....
(e) Point where water will be returned to stream
.....
8. Estimated cost of works:
(a) Headgates, $.....
(b) Pumping plant, $.....
(c) Fluming, $.....
(d) Canal—earth, $....., rock, $.....
(e) Other structures ....., $..... Total, $.....
9. Description of diversion works:
I. Nature of works: (Reservoir, dam, ditch, flume, pumping plant, etc.) .....
II. Dimensions of works:
(a) Dam: Height ..... feet; length at bottom ..... feet; length at top ..... feet; thickness at bottom ..... feet; thickness at top ..... feet; slope of front (water) face .....; slope back

[Printed blanks can be obtained from the State Engineer.]

face .....; material used in construction .....

(b) Reservoir; Capacity when filled ..... acre-feet. Surface area at high-water mark ..... acres.

Depth at Outlet—Feet	Surface Area at Each.....Feet of Depth at Outlet—Acres			Capacity—Acre-feet
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....

(c) Headgate: Width ..... feet; height ..... feet; Material .....

(d) Canal: Total length ..... miles.

Location Below Headgate	Depth	Width at Water Bottom Width	Line	Grade per Mile
At.....	mile.....	feet.....	feet.....	feet..... feet.
At.....	mile.....	feet.....	feet.....	feet..... feet.
At.....	mile.....	feet.....	feet.....	feet..... feet.
At.....	mile.....	feet.....	feet.....	feet..... feet.
At.....	mile.....	feet.....	feet.....	feet..... feet.

(Give dimensions where reductions in size are made.)

10. Time required for completion of work ..... years.
11. Time required for completion application of water to the proposed beneficial use ..... years.
12. Choice of newspaper for publication of notice of intention to appropriate .....

State of North Dakota,
County of .....,—ss.

I, ..., being first duly sworn, on my oath, depose and say: That my relation to the above-described undertaking is that of [owner, manager or engineer], that I have read the above and foregoing statement, and examined the map accompanying the same, and that I know of my own personal knowledge that the matters therein stated and shown are true.

Signed .....

[Printed blanks can be obtained from the State Engineer.]

Subscribed and sworn to before me this ..... day of ....., 19...

....., Notary Public [or other qualified officer].

Remarks (by State Engineer):

.....

State of North Dakota,
County of .....,—ss.

Bismarck, N. D., ..., 19...

This is to certify that the foregoing application was received at this office at .... o'clock .... M., upon the .... day of ....., 19.., and that after examination it was.....

....., State Engineer.

By ....., Deputy.

Number of Permit .....
Date of first receipt of application .....19...
Date of return to applicant for correction .....19...
Date of receipt of corrected application .....19...
Date from which application may claim right.....19...
Approved ....., 19... Recorded in Book ...., page .....

This is to certify that I have examined the foregoing application for a permit to appropriate water of the State of North Dakota, and I hereby grant the same as stated herein, subject, however, to the following limitations and conditions:

1st. The equivalent of at least one-fifth of the work above specified is to be completed on or before ....., 19...

2d. The whole of said work is to be completed on or before ....., 19...

3d. The limit of time for proof of beneficial use of water appropriated in accordance herewith is ..... 19...

4th. The water appropriated shall be used for the purpose of .....

5th. The prior right of all persons who, by compliance with the laws of the State of North Dakota, have acquired a right to the use of water must not be injuriously affected by this appropriation.

[Printed blanks can be obtained from the State Engineer.]

6th. The amount of appropriation herein granted shall not exceed ..... cubic feet of water per second of time; neither shall it exceed the capacity of the above-described system of diversion works, nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of the best husbandry; and further, said appropriation must be limited to not more than one-eightieth (1/80) of one cubic foot of water per second of time for each acre of land to which water is actually and beneficially applied on or before ....., 19..; said water to be used during the following described annual periods:

.....

Witness my hand this .. day of ....., 19...

....., State Engineer.

By ....., Deputy.

(Indorsed:) No. ..... Division No. ..... District No. ..... Permit to appropriate water from ..... County, North Dakota. Name of applicant, ... Name of diversion works, ... Date of first receipt at office of State Engineer, ..., 19... Returned to applicant for correction, ..., 19... Corrected application received, ..., 19... Date of water-right, ..., 19... Recorded in book ...., page ..... One-fifth of work to be completed, ..., 19... Whole work to be completed, ..., 19... Final proof of use of water ....., 19... Approved ....., 19... ....., State Engineer. By ....., Deputy.

[Printed blanks can be obtained from the State Engineer.]

No. .....

Water Division No. ....., District No. .....

[Blanks to be filled by the State Engineer.]

Application for a Permit—Enlargement.

[NOTE.—Draw lines through items not applicable. Where not otherwise stated all items refer to the proposed enlargement or extension.]

1. Name of applicant .....
   Postoffice address ....., County ....., State .....
   I. If a corporation:
      (a) Name of same .....
      (b) Date and place of incorporation.....
      (c) Amount of capital stock .....
      (d) Amount paid in .....
      (e) Names and addresses of directors:
      .....

[NOTE.—A certified copy of articles of incorporation must accompany the application.]

   II. Method of accomplishing the work and financial resources of the applicant:
      (a) Method of accomplishing the work. (Whether by contract, employment of others, or by personal labor.).....
      (b) Cash on hand, $.....
      (c) Treasury stock, $.....
      (d) Bonds to be issued, $.....
      (e) Other resources, $.....
2. Name of existing diversion works.....Permit No. ..... Name of enlargement or extension.....
   .....
3. Quantity of water claimed by enlargement or extension..... cubic feet per second.
4. Source of water supply.....
5. Location of point of commencement of extension.....
   .....
6. Annual periods during which water is to be used.....
   .....

[Printed blanks can be obtained from the State Engineer.]

7. To be used for:

I. Irrigation or domestic use:

(a) Number of acres to be irrigated ..... acres.

(b) Legal subdivisions to be irrigated.....

[NOTE.—A list of lands to be irrigated, giving each subdivision and fraction with acreage thereof, should be written here, or may be appended as a part of this application. Same must also be shown on accompanying map.]

(c) Statement as to domestic use (giving location, etc.)

.....

II. Mining, power, manufacturing, transportation, or other purposes:

(a) Nature of use.....

(b) Amount of power to be generated ..... horse-power.

(c) Location of plant.....

(d) Method of developing power.....

(e) Point where water will be returned to stream.....

8. Estimated cost of works:

(a) Headgates, $.....

(b) Pumping plant, $.....

(c) Fluming, $.....

(d) Canal—earth, $..... rock, $.....

(e) Other structures ..... $..... Total, $.....

9. Description of diversion works:

I. Nature of works: (Reservoir, dam, ditch, flume, pumping plant, etc.).....

II. Dimensions of works:

(a) Dam: Height ..... feet; length at bottom ..... feet; length at top ..... feet; thickness at bottom ..... feet; thickness at top ..... feet; slope of front (water) face.....; slope of back face, ...; material used in construction,.....

.....

(b) Reservoir: Capacity when filled ..... acre-feet. Surface area at high-water mark ..... acres.

Depth at Outlet—Feet	Surface Area at Each.....Feet of Depth at Outlet—Acres			Capacity—Acre-feet
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....

[Printed blanks can be obtained from the State Engineer.]

(c) Headgate: Width ..... feet; height ..... feet; Material .....

(d) Canal: Total length ..... miles.

Location below Headgate	Depth	Bottom Width	Width at Water Line	Grade per Mile
At..... mile.....	feet.....	feet.....	feet.....	feet.
At..... mile.....	feet.....	feet.....	feet.....	feet.
At..... mile.....	feet.....	feet.....	feet.....	feet.
At..... mile.....	feet.....	feet.....	feet.....	feet.
At..... mile.....	feet.....	feet.....	feet.....	feet.

(Give dimensions where reductions in size are made.)

10. Time required for completion of work ..... years.
11. Time required for complete application of water to the proposed beneficial use ..... years.
12. Choice of newspaper for publication of notice of intention to appropriate .....

State of North Dakota,
County of .....,—ss.

I, ..., being first duly sworn, on my oath depose and say: That my relation to the above-described undertaking is that of [owner, manager or engineer], that I have read the above and foregoing statement, and examined the map accompanying the same, and that I know of my own personal knowledge that the matters therein stated and shown are true.

Signed .....

Subscribed and sworn to before me this ..... day of ....., 19..

.....,
Notary Public [or other qualified officer].

Remarks (by State Engineer):

.....

[Printed blanks can be obtained from the State Engineer.]

State of North Dakota,
County of .....,—ss.

Bismarck, N. D., ..., 19...

This is to certify that the foregoing application was received at this office at .... o'clock .... M., upon the .... day of ....., 19.., and that after examination it was .....

....., State Engineer.

By ....., Deputy.

Number of Permit .....
Date of first receipt of application.....19...
Date of return to applicant for correction..... 19...
Date of receipt of corrected application .....19...
Date from which application may claim right .....19...
Approved ....., 19... Recorded in Book ...., page .....

This is to certify that I have examined the foregoing application for a permit to appropriate water of the State of North Dakota, and I hereby grant the same as stated herein, subject, however, to the following limitations and conditions:

1st. The equivalent of at least one-fifth of the work above specified is to be completed on or before ....., 19...

2d. The whole of said work is to be completed on or before ....., 19...

3d. The limit of time for proof of beneficial use of water appropriated herewith is ....., 19...

4th. The water appropriated shall be used for the purpose of .....

5th. The prior right of all persons who, by compliance with the laws of the State of North Dakota, have acquired a right to the use of water must not be injuriously affected by this appropriation.

6th. The amount of appropriation herein granted shall not exceed ..... cubic feet of water per second of time; neither shall it exceed the capacity of the above-described system of diversion works, nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of the best husbandry; and further, said appropriation must

[Printed blanks can be obtained from the State Engineer.]

be limited to not more than one-eightieth (1/80) of one cubic foot of water per second of time for each acre of land to which water is actually and beneficially applied on or before ....., 19..; said water to be used during the following described annual periods:

.....

Witness my hand this .... day of ....., 19...

....., State Engineer.

By ....., Deputy.

(Indorsed:) No. ..... Division No. ..... District No. ..... Permit to appropriate water from ..... County, North Dakota. Name of applicant, ... Name of diversion works, ... Date of first receipt at office of State Engineer ....., 19... Returned to applicant for correction ....., 19... Corrected application received ....., 19.... Date of water-right, ..., 19.. Recorded in Book ...., page ..... One-fifth of work to be completed, ..., 19... Whole work to be completed ....., 19... Final proof of use of water ....., 19... Approved ....., 19... ....., State Engineer. By ....., Deputy.

Notice of Intention to Appropriate Water.

No. .....

(First Publication ....., 19...)

Appropriation of Water.

Office of the State Engineer.

Bismarck, N. D., ..., 19...

Notice is hereby given that ....., whose postoffice address is ..... County, N. D., has made an application in accordance with the provisions of the irrigation laws of North Dakota for a permit to appropriate for beneficial use ..... cubic feet of water per second of time from ....., through the

[Printed blanks can be obtained from the State Engineer.]

....., the point of diversion of which is to be located upon the ..... bank of said stream in the ..... ¼ of the ..... ¼ of section ....., township ....., range ....., said water to be used for the purpose of ..... upon the .....

This application will be taken up by the State Engineer at his office at Bismarck for consideration and appropriate action upon the .... day of ....., 19.., at 9 A. M., at which time all persons who believe that the prior rights would be injuriously affected, or that the allowance of the permit would be detrimental to the public welfare, and also parties making the application, and to be benefited, are notified to be present either by sworn affidavit or in person for the purpose of presenting any relevant testimony.

....,
State Engineer.

No. .....

Proof of Publication.

State of North Dakota,
County of .....,—ss.

....., being duly sworn, deposes and says that the annexed printed copy of Notice of Intention to Appropriate Water was taken from the ....., a newspaper which, during the whole time of publication of said notice hereinafter stated, has been and is printed and published in the ..... of ..... County of ....., and State of North Dakota. That the said notice was published in said newspaper on the following dates:

.....

in each and every issue of the full number thereof, commencing on the .... day of ....., 19.., and ending on the .... day of ....., 19.., upon which days or times of publication aforesaid the newspaper was regularly published, and that during the whole time of said publication he was ..... the printer.. and publisher.. of the said newspaper.

.....

[Printed blanks can be obtained from the State Engineer.]

Subscribed and sworn to before me this .... day of ....., A. D. 19...

....,
Notary Public ..... County, N. D.

State of North Dakota,
County of .....,—ss.

I, ..., being duly sworn, upon my oath say, that I am the engineer of the .....; that the survey and map thereof were made by me (or under my direction), and that such survey is accurately represented upon this map; and that I have read the accompanying statement and know of my own knowledge that the statements therein made are true.

....,
Engineer [or Surveyor].

Subscribed and sworn to before me this .... day of ....., 19...

....,
Notary Public [or other qualified officer].

Maps.

1. The map of a ditch shall show:
(a) Title, giving name of ditch or canal.
(b) Location of headgate, by course and distance to a government corner, or if on unsurveyed lands to some natural object so that the site can be easily found. True courses are to be used, the magnetic variations being also stated.
(c) Stream, and name thereof, from which water is diverted.
(d) Route and total length of ditch or canal.
(e) Lands crossed with names of owners thereof.
(f) Lands to be irrigated, with names of owners thereof.
(g) Locations, with elevations thereof, of bench marks at the headgate or other suitable points.

II. The map of the reservoir shall show:
(a) Title, giving name of reservoir.
(b) Location of initial point of survey, as in case of canal.
(c) The location of the dam, of the high-water line, and contour lines at appropriate intervals and both the area within the high-water line and the capacity of the reservoir when filled to the high-water line.
(d) Stream, with name thereof, from which reservoir derives its supply of water.
(e) Location of ditches to and from reservoir.
(f) Legal subdivision and ownership thereof.
(g) Lands to be irrigated and ownership thereof.
(h) A bench mark outside of reservoir, this bench mark being referenced to the high-water line and other important elevations.
(i) The location of the outlet with reference to a government corner, or, if upon unsurveyed ground, to some natural object, or to the initial point of survey.

III. (a) Both ditch and reservoir maps shall have thereon a certificate of the engineer who made the survey, substantially as [given at the end of the last form].

[Printed blanks can be obtained from the State Engineer.]

(3d ed.)

§ 1467. OREGON FORMS.

(1911.)

State Engineer's instructions and suggestions.
Application for a permit to appropriate the public waters of the State of Oregon.
Application for a permit to appropriate the public waters of the State of Oregon [enlargement of existing works].
Application for a permit to construct a reservoir and to store for beneficial use the unappropriated waters of the State of Oregon.
Petition for determination of water-rights.
Notice of proceedings to determine water-rights.
State Engineer's instructions accompanying notice of adjudication of water-rights.
Statement and proof of claimant in adjudication of rights.
Notice of completion of testimony.
Certificates.

State Engineer's Instructions and Suggestions.

Office of the State Engineer,
Salem, Oregon, July 28, 1909.

"*Any person, association or corporation* hereafter intending to acquire the right to the beneficial use of any waters *shall, before commencing the construction, enlargement or extension of any ditch, canal or other distributing or controlling works*, or performing any work in connection with said construction, or proposed appropriation, *make an application to the State Engineer for a permit* to make such appropriation. Any person who shall willfully divert or use water to the detriment of others without compliance with law shall be deemed guilty of a misdemeanor. The possession or use of water, except when a right of use is acquired in accordance with law, shall be *prima facie* evidence of the guilt of the person using it." Sec. 45, Law of 1909.

"It shall be a misdemeanor to use, store, or divert any water until after the issuance of permit to appropriate such waters." Sec. 66, Law of 1909.

Applications.

Applications should be made upon forms prescribed by the State Engineer (not in duplicate).

An application is not a permit to appropriate water until after its approval by the State Engineer.

Three different application forms are provided, one for original or new diversions, another for the enlargements or extensions of existing works, and a third for the construction of reservoir and storage of unappropriated waters. These can be secured without charge by addressing the State Engineer, Salem, Oregon.

A permit to construct a reservoir and store surplus water does not grant the right to divert and use such stored water. Separate applications should, therefore, be made for each of these purposes.

Application for a permit to divert stored water when released in a natural stream is known as a secondary permit. It need not be made at the time of application for a reser-

[Printed blanks can be obtained from the State Engineer.]

voir permit. Such application when made should refer to such reservoir for a supply of water and be accompanied by documentary evidence that an agreement has been entered into with the owner of the reservoir for a permanent and sufficient interest in said reservoir to impound enough water for the purposes set forth in said application.

Each application should be forwarded to the State Engineer, accompanied by the necessary maps and fees. Strict compliance with the rules governing the submission of maps is important. Defective applications will be returned for correction without loss of priority.

Maps.

Each application must be accompanied by a map *in duplicate*, one of which must be on tracing linen. The other may be a blue-print copy of such tracing.

The map must be neatly and accurately drawn with India ink, to a scale of two inches to the mile (40 chains to 1 inch). If necessary several sheets can be employed to avoid maps of unwieldy dimensions.

The map must show the location of the point of diversion by courses and distances from some government corner. The location of the headgate should be indicated. The actual location of the main ditch or canal should be shown throughout, and where government survey lines are crossed, frequent ties to section corners should be shown. Where the appropriation is for irrigation purposes, the estimated acreage to be irrigated in each smallest legal subdivision or 40-acre tract should be written on the map within the respective divisions. (Where but few corners can be found, give the location of the line by courses and distances, beginning with the point of diversion, or submit field-notes.)

The map must show the name and location of the stream from which water is to be taken; the location and area of land to be irrigated, or place where water is to used for other purposes. (This may be done by marking the boundaries, or by coloring the areas.)

Whenever the canal line crosses streams, or other ditches, the location of such crossings must be shown and such intersecting streams and ditches can be more clearly shown by using ink of a different color.

Maps must show the name of the ditch, canal, or reservoir, and the *certificate of surveyor* as given below.

If water-power is to be developed, a profile of that portion of the canal wherein the power is to be developed, should be shown on the map, or accompany the same.

Lands may be shown by tinting with a colored pencil on the dull side of the tracing linen and this rubbed to an even tint by means of a medium hard rubber eraser. Where an enlargement application is made, the lands under existing rights through the same ditch should be shown in different colors. Colors which will not blue-print well should not be used. The preferred colors are: Black, Green, Orange, Red and Yellow. Lettering on a map should be sparing, and superfluous matter should not be placed thereon. Indelible pencil or a typewriter should not be used on tracing linen, since the oil in the cloth will cause these colors to spread, and in time it becomes almost obliterated. The affidavit of the surveyor should be neatly lettered on the map.

Plans of dams, cribs or embankments must be drawn on longitudinal scale of not less than one inch to two hundred feet, and for cross-sections, of not less than one inch to twenty feet. Detail plans for outlet and wasteways for reservoirs shall be shown in all cases where the dam will be over five feet in height.

Reservoirs—The map of a reservoir shall show the total area to be submerged and enough levels to permit of computing its capacity in acre-feet. For large reservoirs, contours of 5 or 10-foot interval should be shown.

For earth dams the slope should be approximately 3 to 1 for the front or water side, and 2 to 1 for the back. A top width sufficient for a roadway is generally sufficient.

These technical requirements for maps will be waived for appropria-

[Printed blanks can be obtained from the State Engineer.]

tions of three second-feet or less, where, on account of great distances, the expense of employment of a surveyor is out of proportion to the value of the appropriation, provided the appropriator is able to furnish in intelligent form the fundamental information.

Fees.

The law provides for the payment of the following fees to the State Engineer:

(*a*) For examining an application, $3.00. (This amount should in all cases accompany the application.)

(*b*) For filing and recording each application for permit to appropriate water, depending on the use, as follows:

For Irrigation—Computed in accordance with the following graduated scale, and based upon the number of acres which you propose to irrigate as shown by the application:

15 cents per acre from 0 acres to 100 acres, inc.
5 cents per acre from 100 acres to 1000 acres, inc.
1 cent per acre for each acre in excess of 1,000 acres.

For Power Purposes—As follows, for each theoretical water horsepower: (Not actual horse-power.)

25 cents per horse-power from 0 to 100, inclusive.
10 cents per horse-power from 100 to 1000, inclusive.
5 cents for each horse-power in excess of 1000.

For Any Other Purpose—Including applications by municipalities for power purposes, five dollars for filing and recording each permit.

(*c*) For filing or recording any other water-right instrument, one dollar for the first hundred words and ten cents for each additional hundred words or fraction thereof.

(*d*) For making copy of any document recorded or filed in his office, ten cents for each hundred words or fraction thereof, but where the amount exceeds five dollars, then only actual cost in excess of that amount shall be charged.

(*e*) For certifying to copies, documents, records or maps, one dollar for each certificate.

(*f*) For blue-print copy of any map or drawing, ten cents per square foot or fraction thereof. For such other work as may be required of his office, actual cost of the work.

Remittances should be made by draft or postal money order to John H. Lewis, State Engineer, Salem, Oregon. Where personal check is sent, the exchange charge, if any, of the local bank, should be added.

General.

Applications should not be made for more water than can be applied to a beneficial use.

The commencement of work, the completion of work, and the application of water to the beneficial use must be accomplished within the time specified in the permit. The priority of rights can be maintained only in so far as these requirements are complied with. The State Engineer should be notified immediately upon the completion of your ditch or other works.

One cubic foot per second of water is, under ordinary conditions, sufficient to irrigate eighty to one hundred acres of land. One cubic foot per second flowing 24 hours will cover one acre two feet deep, and flowing 120 days will equal 240 acre-feet. This amount of water applied on 80 acres will cover it to a depth of 3 feet.

One cubic foot per second (abbreviated second-foot) of water falling 8.8 feet is equal to one theoretical horse-power, or *Quantity in second-feet* x *fall in feet*÷8.8=*Theoretical horse-power.*

Chapter 221, Laws of 1909, provides for the payment of certain annual fees in addition to those mentioned above for power purposes.

Enlargements or Extensions.

In case of an enlargement, if the applicant is the owner of the ditch to be enlarged, he should so state; if not, the written consent

[Printed blanks can be obtained from the State Engineer.]

of the owner must accompany the application. The following form for consent to enlarge may be used:

....., 19...

I, [or we], ..., the sole owner of the ..... Ditch taking water from ....., in the .....
(Name of stream)
of Sec. ....., Tp. ....., R. ....., E. W. M., do hereby give my [or our] free and voluntary consent to the enlargement or extension of, and to the use of water through, the said ditch by ....., according to the terms of this enlarged permit.

.....
.....

Certificate of Surveyor.

[NOTE.—This certificate must be neatly lettered on the map in all cases, and signed by the surveyor.]

I, ..., of ....., do hereby certify that this map was made from notes taken during an actual survey made by me (or under my immediate supervision) on ....., 19.., and that it correctly represents the works described in the accompanying application, together with the location of streams and other ditches in the immediate vicinity, and has written thereon the area in each smallest legal subdivision which it is proposed to irrigate.

.....,
Surveyor.

Approved by the Board of Control, July 28, 1909.

Permit No. .....

Application for a Permit to Appropriate the Public Waters of the State of Oregon.

I, ...
(Name of applicant)
of ....., County of .....,
(Postoffice)
State of ....., do hereby make application for a permit to appropriate the following described public waters of the State of Oregon, subject to existing rights:

[Printed blanks can be obtained from the State Engineer.]

If the applicant is a corporation, give date and place of incorporation .....

1. The source of the proposed appropriation is .....
.....
(Name of stream.)
2. The amount of water which the applicant intends to apply to beneficial use is ..... cubic feet per second.
3. The use to which the water is to be applied is .....
.....
(Irrigation, power, mining, manufacturing, domestic supplies, etc.)
4. The point of diversion is located .....
.....
(Give distance and bearing to section corner)
being within the ..... of Sec.
(Give smallest legal subdivision)
....., Tp. ....., R. ....., W. M.,
(No. N. or S.) (No. E. or W.)
in the county of .....
5. The ....., to be ..... miles in length, terminating in the ..... of Sec. .....,
(Main ditch, canal or pipe-line) (Smallest legal subdivision)
Tp. ....., R. ....., W. M., the proposed location being shown throughout on the accompanying map.
(No. N. or S.) (No. E. or W.)
6. The name of the ditch, canal or other works is.....
.....

DESCRIPTION OF WORKS.

Diversion Works—

7. (a) Height of dam ..... feet, length on top ..... feet, length at bottom ..... feet; material to be used and character of construction.....
.....
(Loose rock, concrete, masonry, rock and brush, timber crib, etc., wasteway over or around dam)
(b) Description of headgate .....
.....
(Timber, concrete, etc., number and size of openings)

Canal System—

8. (a) Give dimensions at each point of canal where materially changed in size, stating miles from headgate. At head-

[Printed blanks can be obtained from the State Engineer.]

gate: Width on top (at water line) ..... feet; width on bottom ..... feet; depth of water ..... feet; grade ..... feet fall per one thousand feet.

(b) At ..... miles from headgate: Width on top (at water line) ..... feet; width on bottom ..... feet; depth of water ..... feet; grade ..... feet fall per one thousand feet.

FILL IN THE FOLLOWING INFORMATION WHERE THE WATER IS USED FOR:

Irrigation—

9. The land to be irrigated has a total area of ..... acres, located in each smallest legal subdivision, as follows: .....

.....

(Give area of land in each smallest legal subdivision which you intend to irrigate)

.....

(If more space required, attach separate sheet)

Power, Mining, Manufacturing, or Transportation Purposes—

10. (a) Total amount of power to be developed ..... horsepower.

(b) Total fall to be utilized ..... feet.
(Head)

(c) The nature of the works by means of which the power is to be developed .....

.....

(d) Such works to be located in ....., of Sec.
(Legal subdivision)
....., Tp. ....., R. ....., W. M.
(No. N. or S.) (No. E. or W.)

(e) Is water to be returned to any stream?.....
(Yes or No.)

(f) If so, name stream and locate point of return.....
...., Sec....., Tp. ....., R. .....,
(No. N. or S.) (No. E. or W.)
W. M.

(g) The use to which the power is to be applied is.....

.....

(h) The nature of the mines to be served.....

.....

[Printed blanks can be obtained from the State Engineer.]

Municipal Supply—

11. To supply the city of ....., ... County,
(Name of)
having a present population of ....., and an estimated population of ..... in 19...

(Answer questions 12, 13, 14, and 15 in all cases)

12. Estimated cost of proposed works, $.....
13. Construction work will begin on or before .....
14. Construction work will be completed on or before .....
15. The water will be completely applied to the proposed use on or before .....

Duplicate maps of the proposed ditch or other works, prepared in accordance with the rules of the Board of Control, accompany this application.

.....
(Name of applicant)
.....
.....

Signed in the presence of us as witnesses:

(1) ....., ...
(Name) (Address of witness)

(2) ....., ...
(Name) (Address of witness)

State of Oregon,
County of Marion,—ss.

This is to certify that I have examined the foregoing application, together with the accompanying maps and data, and return the same for correction or completion, as follows:.....

In order to retain its priority, this application must be returned to the State Engineer, with corrections, on or before ..... 19...

Witness my hand this .... day of ....., 19...

....,
State Engineer.

State of Oregon,
County of Marion,—ss.

This is to certify that I have examined the foregoing application, and do hereby grant the same, subject to the following limitations and conditions: .....

[Printed blanks can be obtained from the State Engineer.]

The amount of water appropriated shall be limited to the amount which can be applied to beneficial use and not to exceed ..... cubic feet per second.

Actual construction work shall begin on or before ....., and shall thereafter be prosecuted with reasonable diligence and be completed on or before .....

Complete application of the water to the proposed use shall be made on or before .....

Witness my hand this .... day of ....., 19...

....,
State Engineer.

State of Oregon,
County of Marion,—ss.

This is to certify that I have examined the foregoing application and do hereby grant the same, subject to the following limitations and conditions: .....
.....

The amount of water appropriated shall be limited to the amount which can be applied to beneficial use and not to exceed ..... cubic feet per second.

Actual construction work shall begin on or before ....., and shall thereafter be prosecuted with reasonable diligence and be completed on or before .....

Complete application of the water to the proposed use shall be made on or before .....

Witness my hand this .... day of ....., 19...

....,
State Engineer.

(Indorsed:) Application No. ...., Permit No. ..... Permit to Appropriate the Public Waters of the State of Oregon. Division No. ...., District No. ..... This instrument was first received in the office of the State Engineer at Salem, Oregon, on the .... day of ....., 19.., at .... o'clock .... M. Returned to applicant for correction, ... Corrected application received, ... Approved, ... Recorded in Book No. 1 of Permits, on page ...., State Engineer.

This form approved by the Board of Control March 11, 1909.

[Printed blanks can be obtained from the State Engineer.]

Enlargement Permit No. .....

Application for a Permit to Appropriate the Public Waters of the State of Oregon [Enlargement of Existing Works].

I, ...
(Name of applicant)
of ....., County of .....,
(Postoffice)
State of ....., do hereby make application for a permit to appropriate the following described public waters of the State of Oregon, subject to existing rights.

If the applicant is a corporation, give date and place of incorporation .....
.....

1. The source of the proposed appropriation is.....
(Name of stream)
2. The appropriation to be made by the enlargement (or extension) of .....
(Give name of canal or works to be enlarged)
owned by .....
3. The amount of water which the applicant intends to apply to beneficial use is ..... cubic feet per second, which amount is in addition to the present claimed appropriation.
4. The use to which the water is to be applied is .....
.....
(Irrigation, power, mining, manufacturing, domestic supplies, etc.)

Location and Description of Ditch or Works Which It is Proposed to Enlarge or Extend—

5. (a) The point of diversion from the stream is .....
.....
(Give distance and bearing to section corner)
(b) The headgate is located within the .....
(Smallest legal subdivision)
of Sec. ....., Tp. ....., R. ....., W. M., in
(No. N. or S.) (No. E. or W.)
the county of .....
(c) Said ..... is ..... miles in length and ter-
(Ditch, canal or flume)
minates in the ..... of Sec. ....., Tp.
(Smallest legal subdivision)

[Printed blanks can be obtained from the State Engineer.]

....., R. ....., W. M., the proposed location being shown throughout on the accompanying map.

(d) The dimensions of said ditch just below the headgate are: Width on top (at water line) ..... feet; width on bottom, ... feet; depth of water, ... feet; grade, ... feet fall per 1,000 feet, having a maximum safe capacity of ..... cubic feet per second.

(e) Said ditch now serves to irrigate the following described land: .....

(If not used for irrigation, give purpose for which said ditch is used, extent of power developed, mines served, etc.)

(f) The total area now irrigated from said ditch is ..... acres.

(g) The diversion works of said ditch are described as follows: .....

(If any, give character of dam, height, length on top and bottom; spillway over or around dam)

Description of Proposed Enlargement—

6. (a) The diversion dam, after enlargement .....

(Will remain unchanged, or if changed, give height, length, character of material, etc.)

(b) The dimensions of ditch just below the headgate, when enlarged to be: Width on top (at water line), ... feet; width on bottom, ... feet; depth of water, ... feet; grade, ... feet fall per 1,000 feet.

(c) At ..... miles from headgate: Width on top (at water line), ... feet; width on bottom, ... feet; depth of water, ... feet; grade, ... feet fall per 1,000 feet.....

(Give further dimensions at points where changed in dimensions)

(d) The ditch or canal as enlarged to be ..... miles in length. terminating in the ..... of Sec. ....., Tp. .....

(Smallest legal subdivision)

....., R. ....., W. M.

(e) The head of the proposed extension is located.....

(If proposed work is extension of the original ditch or a ditch tapping same, locate by tie to Government corner)

[Printed blanks can be obtained from the State Engineer.]

FILL IN THE FOLLOWING INFORMATION, WHERE THE WATER APPROPRIATED IS TO BE USED FOR:

Irrigation—

7. The land to be irrigated by the proposed extension or enlargement has a total area of ..... acres, located in each smallest legal subdivision, as follows: .....

.....

(Give estimated irrigable acreage in each smallest legal subdivision of land which it is proposed to irrigate)

.....

(If more space required, attach separate sheet)

Power, Mining, Manufacturing or Transportation Purposes—

8. (a) Total amount of power to be developed, ... horsepower.

(b) Total fall to be utilized, ... feet.
(Head)

(c) The nature of the works by means of which the power is to be developed ....., located in .....,
(Legal subdivision)
Sec. ....., Tp. ....., R. ....., W. M.

(d) The use to which the power is to be applied is .....

(e) The nature of the mines to be served .....

Municipal Supply—

9. To supply the city of ....., ... County,
(Name of)
having a present population of ..... and an estimated future population of ..... in 19..

10. Estimated cost of the proposed extension or enlargement, $.....

11. Construction work will begin on or before .....

12. Construction work will be completed on or before .....

13. The water will be completely applied to a beneficial use on or before .....

Duplicate maps of the original canal or other works, showing also the enlargement or extension, prepared in accordance with the rules of the Board of Control, accompany this application.

.....
(Name of applicant.)

.....

.....

[Printed blanks can be obtained from the State Engineer.]

Signed in the presence of us as witnesses:

(1) ....., ...
(Name) (Address of witness)

(2) ....., ...
(Name) (Address of witness)

Remarks: .....
.....

State of Oregon,
County of Marion,—ss

This is to certify that I have examined the foregoing application, together with the accompanying maps and data, and return the same for correction or completion, as follows:.....
.....

In order to retain its priority, this application must be returned to the State Engineer, with corrections, on or before ....., 19...

Witness my hand this .... day of ....., 19...

....,
State Engineer.

State of Oregon,
County of Marion,—ss.

This is to certify that I have examined the foregoing application and do hereby grant the same, subject to the following limitations and conditions: ....
....

The amount of water appropriated shall be limited to the amount which can be applied to beneficial use and not to exceed ..... cubic feet per second.

Actual construction work shall begin on or before ....., and shall thereafter be prosecuted with reasonable diligence and be completed on or before .....

Complete application of the water to the proposed use shall be made on or before .....

Witness my hand this .... day of ....., 19..

....,
State Engineer.

(Indorsed:) Application No. ...., Enlargement Permit No. ..... Permit to Appropriate the Public Waters of the State of

[Printed blanks can be obtained from the State Engineer.]

Oregon. Division No. ..... District No. ..... This instrument was first received in the office of the State Engineer at Salem, Oregon, on the .... day of ....., 19.., at .... o'clock .. M. Returned to applicant for correction, ... Corrected application received, ... Approved, ... Recorded in Book No. 1 of Enlargements, on page ...., State Engineer.

This form approved by the Board of Control March 11, 1909.

Reservoir Permit No. .....

Application for a Permit to Construct a Reservoir and to Store for Beneficial Use the Unappropriated Waters of the State of Oregon.

I, ...,
(Name of applicant)
of ....., County of .....
(Postoffice)
State of ....., do hereby make application for a permit to construct the following described reservoir and to store the unappropriated waters of the State of Oregon, subject to existing rights.

If the applicant is a corporation, give date and place of incorporation .....
.....

1. The name of the proposed reservoir is .....
2. The name of the stream from which the reservoir is to be filled and the appropriation made is.....
3. The amount of water to be stored is ..... acre-feet.
4. The use to be made of the impounded water is .....
.....
(Irrigation, power, domestic supply, etc.)
5. The location of the proposed reservoir will be in Sec.....
.....
(Give sections or townships to be submerged)

(a) State whether situated in channel of running stream and give character of material at outlet .....

[Printed blanks can be obtained from the State Engineer.]

(b) If not in channel of running stream, state how it is to be filled. If through a feed canal, give name and dimensions .....

6. The dam will be located in ....., Sec. ....., (Smallest legal subdivision) Tp. ....., R. ....., W. M. It will (No. N. or S.) (No. E. or W.) be ..... feet in height, having a length on top of ..... feet; length on bottom, ... feet; width on top ..... feet; slope of front or water side, ... (Feet horizontal to 1 vertical) slope on back, ...; height of dam above water (Feet horizontal to 1 vertical) line when full, ... feet.

7. The construction of dam, the material of which it is to be built, and method of protection from waves are as follows: .....

8. The location of wasteway with dimensions are as follows: ..... (State whether over or around the dam)

9. The location of outlet from the proposed reservoir, with character of construction and dimensions, are as follows:..... ..... (State whether through or around the proposed dam)

10. The area submerged by the proposed reservoir, when full, will be ..... acres, with a maximum depth of water of ..... feet, and approximate mean depth of water ..... feet.

11. The estimated cost of the proposed work is $.....

12. Construction work will begin on or before .....

13. Construction work will be completed on or before .....

Duplicate maps of the proposed reservoir and storage works, prepared in accordance with the rules of the Board of Control, accompany this application.

.....
(Name of applicant)
.....
.....

[Printed blanks can be obtained from the State Engineer.]

Signed in the presence of us as witnesses:

(1) ....., ...
(Name) (Address of witness)

(2) ....., ...
(Name) (Address of witness)

.....

Remarks: .....

.....

State of Oregon,
County of Marion,—ss.

This is to certify that I have examined the foregoing application, together with the accompanying maps and data, and return the same for correction or completion, as follows:

.....

In order to retain its priority, this application must be returned to the State Engineer, with corrections, on or before....., 19..

Witness my hand this .... day of ....., 19...

.....,
State Engineer.

State of Oregon,
County of Marion,—ss.

This is to certify that I have examined the foregoing application and do hereby grant the same, subject to the following limitations and conditions:.....

Actual construction work shall begin on or before ....., and shall thereafter be prosecuted with reasonable diligence and be completed on or before .....

Witness my hand this .... day of ....., 19...

.....,
State Engineer.

(Indorsed:) Application No. ..... Reservoir Permit No. ..... Permit to Construct a Reservoir and Store for Beneficial Use the Unappropriated Waters of the State of Oregon. Division No. ...., District No. ..... This instrument was first received in the office of the State Engineer at Salem, Oregon, on the .... day of ....., 19.., at .... o'clock .... M. Returned to applicant for correction, ... Corrected application received,

[Printed blanks can be obtained from the State Engineer.]

..... Approved, ... Recorded in Book No. 1 of Reservoirs, on page ...., State Engineer.

This form approved by the Board of Control March 11, 1909.

Petition for Determination of Water-rights.

Before the Board of Control of the State of Oregon.

Water Division No. .....

..... County.

In the Matter of the Determination of the Relative Rights to the Waters of ....., Tributary of .....

To the Board of Control of the State of Oregon:

....., the undersigned water user.. upon that cer-
(I or We)
tain stream known as ....., hereby represent and allege:

1. That the waters of said stream are claimed by various claimants within ..... Count.., State of Oregon.
2. That ..... claimants to the waters of said
(I or We) (am or are)
stream and ..... name.. and postoffice address
(my or our)
..... as follows:
(is or are)

Name:	Postoffice Address:
.....,	.....
.....,	.....
.....,	.....
.....,	.....

Wherefore, ... pray that a determination of the
(I or We)
relative rights of the various claimants to the waters of said stream be had and made.

Dated this .... day of ....., 19...

....., Petitioner.
....., Petitioner.
....., Petitioner.
....., Petitioner.

(Petitioners will attach hereto a statement of the names and postoffice addresses of all other water users and claimants upon said stream, so far as known, together with names and description of the various ditches diverting water therefrom.)

[Printed blanks can be obtained from the State Engineer.]

(Indorsed:) No. ..... Before the Board of Control of the State of Oregon. Water Division No. ...., ... County. Stream, ... Tributary of ..... Petitioners, ... Petition for Determination of Water-rights, ... Office of Board of Control, Salem, Oregon. Filed ....., 19.., at .... M. ....., Secretary.

Notice of Proceedings to Determine Water-rights.

Before the Board of Control of the State of Oregon.

Water Division No. .....

In the Matter of the Determination of the Relative Rights to the Waters of ....., and Its Tributaries, Tributary of ....., in ..... Count..

To .....

IN THE NAME OF THE STATE OF OREGON: You are hereby notified that the State Engineer of the State of Oregon will begin the examination of that certain stream, known as ....., and its tributaries, situated in ..... Count.., Oregon, and the ditches diverting water therefrom, on ....., the .... day of ....., pursuant to a petition filed requesting a determination of the relative rights of the various claimants to the waters thereof; and you are hereby further notified that the Superintendent of Water Division No. .... will begin the taking of testimony as to the rights of the various claimants to the waters of said stream as follows:

.....

By order of the Board of Control of the State of Oregon, made the .... day of .....

....., State Engineer,
President of the Board.

....., Superintendent,
Water Division No. 1.

....., Superintendent,
Water Division No. 2.

Attest:

.....,
Secretary.

[Printed blanks can be obtained from the State Engineer.]

State Engineer's Instructions Accompanying Notice of Adjudication of Water-rights.

An adjudication of all rights to the waters of the stream named in the inclosed notice has been ordered, a petition for such action having been received and approved. A summary of some of the provisions of the law under which the proposed determination will be had appears below. The fees named must be paid by each claimant when the claim is presented. Fees for irrigation and power are based upon the total acreage or total theoretical horsepower for which a water-right is claimed.

It will be necessary for the protection of any claimed right that the owner thereof present to the Superintendent of the Water Division, at the time and place mentioned in the notice for the taking of testimony, his statement and proof of claim. A blank for that purpose is inclosed. If more than one such time and place be named in the notice, the claimant may present his statement and proof at the hearing most convenient. The blank form should be filled out, so far as possible, prior to the hearing. No proof of claim can be received unless accompanied by the required fee. If additional blanks are required, they can be secured by addressing the Secretary of the Board at Salem, or either of the Superintendents.

Question 6 is very important. In answering it, give the date when steps were first taken to establish the right you now claim, whether such steps were taken by yourself or a predecessor in interest.

To avoid danger of successful contest of your claim by opposing claimants, it is advisable that you limit your filed claim to the amount for which you can establish a right by substantial proof.

It is not required that you appear at the date fixed for the examination of the stream by the State Engineer. The State Engineer's maps will be exhibited at the time of taking testimony.

Any courtesies or assistance shown to the engineers in making the survey of your premises will be greatly appreciated by the Board.

BOARD OF CONTROL OF THE STATE OF OREGON.

JOHN H. LEWIS, State Engineer, President of the Board.
Salem, Oregon.

H. L. HOLGATE, Superintendent of Water Division No. 1.
Klamath Falls, Oregon.

F. M. SAXTON, Superintendent of Water Division No. 2.
Baker City, Oregon.

JAMES T. CHINNOCK, Secretary of the Board.
Salem, Oregon.

[Printed blanks can be obtained from the State Engineer.]

Statement and Proof of Claimant in Adjudication of Rights.

Before the Board of Control of the State of Oregon.

Water Division No. .....

..... Count...

In the Matter of the Determination of the Relative Rights to the Waters of ....., Tributary of .....

In accordance with the provisions of Chapter 216, General Laws of Oregon for 1909.

....., being called as a witness in support of h.. statement of claim, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, for h.. statement and proof of claim testified as follows:

1. Q. What is your name and postoffice address?

A.....

(Give street and number, if any)

2. Q. Do you claim a right to any of the waters of ..... or any of its tributaries?

A.....

3. Q. State whether water is taken from the main stream, or a tributary thereof. If from a tributary, give its name.

A.....

4. Q. What is the nature of the use on which your claim is based?

A.....

(Irrigation, power, mining, manufacturing, domestic, stock, etc.)

5. Q. Upon what is your claim based?

A.....

(Appropriation, diversion and use, adverse use, etc.)

6. Q. State the date of initiation of the water-right which you claim to own.

A.....

(Date of initiation by yourself or predecessor in interest)

7. Q. State the date when water was first used for irrigation or other beneficial purpose.

A.....

(By yourself or predecessor in interest)

8. Q. State the means of utilizing such water. If diverted through a ditch, give its name.

A.....

[Printed blanks can be obtained from the State Engineer.]

9. Q. Are you the owner of said ditch or works? If not, state your proportionate interest therein.

A.....

10. Q. State the date of beginning of construction.

A.....

11. Q. State the date of completion of construction.

A.....

12. Q. If any enlargements were made, state the date of beginning and completion of each successive enlargement..... ....

A.....

(Whether made by yourself or predecessor in interest)

13. Q. State the dimensions of your ditch as originally constructed just below the wasteway or headgate, and if enlarged, of each successive enlargement of such ditch.

A. Width (top) ..... feet; width (bot-
(At water line)
tom), ... feet; depth, ... feet; grade, ...
(Of water)
..... feet.
(Feet fall per 1,000 feet)

First Enlargement—Width (top) ..... feet;
(At water line)
width (bottom), ... feet; depth, ... feet;
(Of water)
grade, ... feet.
(Feet fall per 1,000 feet)

Second Enlargement—Width (top), ...
(At water line)
feet; width (bottom), ... feet; depth, ... feet; grade,
..... feet.
(Feet fall per 1,000 feet)

.....

(Give height of dam if storage or controlling works are involved)

14. Q. State the area of land irrigated the first year, and the number of acres irrigated each subsequent year up to and including the present time.

A.....

(If claim for power, give horse-power developed each year to present time.)

15. Q. Give in detail the acreage in each smallest legal subdivision irrigated by you at the present time. (In answering this question use the following form:)

[Printed blanks can be obtained from the State Engineer.]

Twp.	Range	Sec.	NE 1-4				NW 1-4				SW 1-4				SE 1-4			
			NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼

Total ..... acres.

*16. Q. Give the total area and general location of land which your ditch is intended to irrigate, or the total theoretical horsepower for which you claim a water-right.

A.....

(Attach separate sheet if space is insufficient. If for power where controlling works are involved, give the percentage of daily flow stored to produce above power or peak load.)

17. Q. State the character of the soil and the kinds of crops cultivated (or the use to which the water-power is applied).

A.....

*18. Q. Do you accept the plat prepared by the State Engineer as showing correctly the location of the.....

.....

(Give name, if any, of ditch through which water is diverted.)

Ditch and the land which is or can be irrigated therefrom?

A.....

(These maps will be exhibited at the time of hearing.)

19. Q. When does your irrigation season begin and when does it end?

A.....

---

*In case there is objection to the official plat the parties objecting must, when giving proof, file a written statement of the reasons therefor, and must, within thirty days, file with the Division Superintendent a map of said ditch and irrigated lands, with affidavit of surveyor thereto giving date of survey. Such map should be on tracing linen, on a scale of two inches to the mile (forty chains to one inch), and should have marked thereon, within each forty-acre legal subdivision, the area of land which is irrigated.

Where a water-right has been initiated prior to February 24, 1909, and the works are incomplete, or the water not yet or only partially applied to beneficial use, a map of lands on the above scale should accompany this statement, or filed with the Division Superintendent within thirty days from date of proof, which maps should be drawn on uniform sheets of tracing linen, 13½ in. by 19 in., with two inch margin for binding on left, or 13½ in. edge, and should show the area which it is proposed to irrigate in each forty-acre tract, as well as main canals and general plans of all important structures to be built. The affidavit of surveyor or engineer should be attached, with date. The surveys of the State Engineer will show only constructed works and lands now irrigated.

[Printed blanks can be obtained from the State Engineer.]

20. Q. State the amount of water which you have put to a beneficial use for each purpose for which you claim a right, and the total amount which you claim for each of said purposes.

A.....

21. Q. During what months is the water used for each of said purposes?

A.....

†22. Q. If water is used for power development, state the total fall utilized and the theoretical (not actual) horse-power developed.

A.....

23. Q. Have you had sufficient water each year since the use for which an appropriation is claimed began? If not, state the years of scarcity, the months when the supply was insufficient, and the reason for such scarcity.

A.....

24. Q. State what interest, if any, you have in the land or the works for which you claim a right to water.

A.....

Remarks: .....

.....,

Signature of Claimant.

State of Oregon,
County of .....,—ss.

This is to certify that the above-named ..... personally appeared before me in support of h.. said statement and proof; that each of the foregoing questions and answers was read to h.. in my presence before ..he subscribed h.. name thereto; and that the same was subscribed and sworn to before me, at ....., Oregon, this .... day of ....., 19.., as said claimant's statement and proof herein.

In testimony whereof, I have hereunto set my hand this .... day of ....., 19.., at ....., Oregon.

....,

Superintendent of Water Division No. ...., of the State of Oregon.

---

†Theoretical horse-power = total quantity claimed in cubic feet per second, times fall in feet, divided by 8.8 (one cubic foot per second falling 8.8 feet equals 1 theoretical horse-power, or 550 foot pounds per second).

[Printed blanks can be obtained from the State Engineer.]

(Indorsed:) No. ..... Before the Board of Control of the State of Oregon. Water Division No. ...., ... Count.. Date of priority, ... Name of stream, ... Tributary of ..... Ditch, ... Claimant, ... Fees paid, ..., $..... Statement and Proof of Claimant, ... Filed ....., 19... ....., Superintendent. Office of Board of Control. Filed ....., 19... ....., Secretary.

(NOTE.—This statement should be filled out so far as possible, prior to the date of hearing, and should be presented at such hearing, together with the required fee, if you claim any of the waters of the stream under adjudication.)

Notice of Completion of Testimony.

You are hereby notified that all testimony and evidence heretofore submitted by the various claimants to the waters of ....., a tributary of ....., in ..... Count.., Oregon, will be open for inspection for a period of ..... days, beginning on ....., the .... day of ....., 19.., and ending on ....., the .... day of ....., 19.. (Sundays excepted), from 9:00 to 12:00 o'clock A. M., and from 1:30 to 5:00 o'clock P. M., at ....., in ....., ... County, Oregon.

You are further notified that the determination of the Board of Control in this cause will be heard by the Circuit Court of the State of Oregon for ..... County.

This notice is given pursuant to section 18 of chapter 216 of the General Laws of Oregon for 1909.

....,
Superintendent of Water Division No. .....

Certificates.

(No form of certificate has been adopted up to January, 1911, no certificates having been issued yet.—THE AUTHOR.)

[Printed blanks can be obtained from the State Engineer.]

(3d ed.)

§ 1468. SOUTH DAKOTA FORMS.

(1911.)

Application for a permit to appropriate water within the State of South Dakota.

Enlargement—Application for a permit to appropriate water within the State of South Dakota.

Published notice of application.

Proof of publication.

Notice of completion of works.

Certificate of examination of works.

Certificate of construction of works.

Notice of application of water to beneficial use.

Certificate of application of water to beneficial use—Deposition of holder.

Water license.

Dry-draw filings.

Dry-draw certificate.

No. .....

Water Division No. ....., ... District.

(Blanks to be filled by the State Engineer.)

Application for a Permit to Appropriate Water Within the State of South Dakota.

(NOTE.—Draw a line through items not applicable.)

1. Name of applicant.....
   Postoffice address....., County ....., State .....
   I. If a corporation:.....
      (a) Name of same.....
      (b) Date and place of incorporation.....
      (c) Amount of capital stock.....
      (d) Amount paid in.....
      (e) Names and addresses of directors:
      .....

(NOTE.—A certified copy of articles of incorporation must accompany the application.)

   II. Method of accomplishing the work and financial resources of the applicant:
      (a) Method of accomplishing the work. (Whether by contract, employment of others, or by direct labor.).....

[Printed blanks can be obtained from the State Engineer.]

(b) Cash on hand, $.....
(c) Treasury stock, $.....
(d) Bonds to be issued, $.....
(e) Other resources, $.....

2. Name of diversion works, ...
3. Quantity of water claimed, ... cubic feet per second.
4. Source of water supply,.....
5. Location of point of diversion, ...
..... on ....bank.
(Right or left bank looking downstream)
6. Annual periods during which water is to be used.....
.....
7. To be used for:
I. Irrigation or domestic use:
(a) Number of acres to be irrigated, ... acres.
(b) Legal subdivisions to be irrigated.....

(NOTE.—A list of lands to be irrigated, giving each subdivision and fraction with acreage thereof, should be written here, or may be appended as a part of this application. Same must also be shown on accompanying map.)

(c) Statement as to domestic use (giving location, etc.)
.....
II. Mining, power, manufacturing, transportation, or other purposes:
(a) Nature of use.....
(b) Amount of power to be generated, ... horsepower.
(c) Location of plant, ...
(d) Method of developing power.....
(e) Point where water will be returned to stream.....
.....
8. Estimated cost of works:
(a) Headgates, $.....
(b) Pumping plant, $.....
(c) Fluming, $.....
(d) Canal—earth, $..... Rock, $.....
(e) Other structures, ..., $ ..... Total, $.....
9. Description of diversion works:
I. Nature of works: (Reservoir, dam, ditch, flume, pumping plant, etc.)
.....

[Printed blanks can be obtained from the State Engineer.]

II. Dimensions of works:

(a) Dam: Height, ... feet; length at bottom, ... feet; length at top, ... feet; thickness at bottom, ... feet; thickness at top, ... feet; slope of front (water) face, ...; slope of back face, ...; material used in construction, ...

(b) Reservoir: Capacity when filled, ... acre-feet. Surface area at high-water mark, ... acres.

DEPTH AT OUTLET—FEET.	SURFACE AREA AT EACH.....FEET OF DEPTH AT OUTLET—ACRES.	CAPACITY—ACRE-FEET.

(c) Headgate: Width, ... feet; height, ... feet; Material.....

(d) Canal: Total length, ... miles.

LOCATION BELOW HEADGATE	DEPTH	BOTTOM WIDTH	WIDTH AT WATER LINE	GRADE PER MILE
At mile	feet	feet	feet	feet
At mile	feet	feet	feet	feet
At mile	feet	feet	feet	feet
At mile	feet	feet	feet	feet
At mile	feet	feet	feet	feet

(Given dimensions where reductions in size are made.)

10. Time required for completion of work, ... years.
11. Time required for complete application of water to the proposed beneficial use, ... years.
12. Choice of newspaper for publication of notice of intention to appropriate.....

[Printed blanks can be obtained from the State Engineer.]

State of South Dakota,
County of .....,—ss.

I, ..., being first duly sworn, on my oath depose and say: That my relation to the above-described undertaking is that of ....., that I have
(Owner, manager or engineer)
read the above and foregoing statement, and examined the map accompanying the same, and that I know of my own personal knowledge that the matters therein stated and shown are true.

Signed .....

Subscribed and sworn to before me this .... day of ....., 19...

....,
Notary Public [or other qualified officer].

Remarks by State Engineer:

.....

State of South Dakota,
County of .....,—ss.

Pierre, South Dakota, ..., 19...

This is to certify that the foregoing application was received at this office at .... o'clock .... M., upon the .... day of ....., 19.., and that after examination it was .....
.....
.....,
State Engineer.

By .....,
Deputy.

Number of permit, ...
Date of first receipt of application, ...19...
Date of return to applicant for correction, ...19...
Date of receipt of corrected application, ...19...
Date from which applicant may claim right, ...19...
Approved ....., 19.., Recorded in Book ...., page .....

This is to certify that I have examined the foregoing application for a permit to appropriate water of the State of South Dakota, and I hereby grant the same as stated herein, subject, however, to the following limitations and conditions.

[Printed blanks can be obtained from the State Engineer.]

1st. The equivalent of at least one-fifth of the work above specified is to be completed on or before ....., 19...

2d. The whole of said work is to be completed on or before ..... 19...

3d. The limit of time for proof of beneficial use of water appropriated in accordance herewith is ....., 19...

4th. The water appropriated shall be used for the purpose of .....

5th. The prior right of all persons who, by compliance with the laws of the State of South Dakota, have acquired a right to the use of water must not be injuriously affected by this appropriation.

6th. The amount of the appropriation herein granted shall not exceed ..... cubic feet of water per second of time; neither shall it exceed the capacity of the above-described system of diversion works, nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of the best husbandry; and further, said appropriation must be limited to not more than one-seventieth (1/70) of one cubic foot of water per second of time for each acre of land to which water is actually and beneficially applied for irrigation on or before ....., 19..; said water to be used during the following described annual periods.

.....

Witness my hand this .... day of ....., 19...

....., State Engineer.

By ....., Deputy.

(Indorsed:) No. ...., Division No. ...., ... District. Permit to Appropriate Water from ....., ... County, South Dakota. Name of applicant, ... Name of diversion works, ... Date of first receipt at office of State Engineer, ..., 19... Returned to applicant for correction, ..., 19... Corrected application received, ..., 19... Date of water-right, ..., 19... Recorded in Book ...., page ..... One-fifth of work to be completed ....., 19...

[Printed blanks can be obtained from the State Engineer.]

Whole work to be completed, ..., 19... Final proof of use of water, ..., 19... Approved ....., 19... .....
....., State Engineer. By ....., Deputy.

No. .....

Water Division No. ....., ... District.

(Blanks to be filled by the State Engineer.)

Enlargement—Application for a Permit to Appropriate Water Within the State of South Dakota.

(NOTE.—Draw lines through items not applicable. Where not otherwise stated all items refer to the proposed enlargement or extension.)

1. Name of applicant.....
   Postoffice address ....., County ....., State .....
   I. If a corporation:
      (a) Name of same.....
      (b) Date and place of incorporation.....
      (c) Amount of capital stock ....
      (d) Amount paid in.....
      (e) Names and addresses of directors:
      .....

(NOTE.—A certified copy of articles of incorporation must accompany the application.)

   II. Method of accomplishing the work and financial resources of the applicant:
      (a) Method of accomplishing the work. (Whether by contract, employment of others, or by personal labor.).....
      (b) Cash on hand, $.....
      (c) Treasury stock, $.....
      (d) Bonds to be issued, $.....
      (e) Other resources, $.....
2. Name of existing diversion works, ... Permit No.....
   Name of enlargement or extension, ...
3. Quantity of water claimed by enlargement or extension, ... cubic feet per second.

[Printed blanks can be obtained from the State Engineer.]

4. Source of water supply.....
5. Location of point of commencement of extension.....
.....
6. Annual periods during which water is to be used.....
7. To be used for:
   I. Irrigation or domestic use:
      (a) Number of acres to be irrigated, ... acres.
      (b) Legal subdivisions to be irrigated, ...

(NOTE.—A list of lands to be irrigated, giving each subdivision and fraction with acreage thereof, should be written here, or may be appended as a part of this application. Same must also be shown on accompanying map.)

      (c) Statement as to domestic use (giving location, etc.).....
.....
   II. Mining, power, manufacturing, transportation, or other purposes:
      (a) Nature of use.....
      (b) Amount of power to be generated, ... horsepower.
      (c) Location of plant.....
      (d) Method of developing power.....
      (e) Point where water will be returned to stream
.....
8. Estimated cost of works:
   (a) Headgates, $.....
   (b) Pumping plant, $.....
   (c) Fluming, $.....
   (d) Canal—earth, $.....; rock, $.....
   (e) Other structures, ..., $..... Total, $.....
9. Description of diversion works:
   I. Nature of works: (Reservoir, dam, ditch, flume, pumping plant, etc.)
.....
   II. Dimensions of works:
      (a) Dam: Height, ... feet; length at bottom, ... feet; length at top. ..... feet; thickness at bottom, ... feet; thickness at top, ... feet; slope of front (water) face, ...; slope of back face, ...; material used in construction, ...

[Printed blanks can be obtained from the State Engineer.]

(b) Reservoir: Capacity when filled, ... acre-feet.
Surface area at high-water mark, ... acres.

DEPTH AT OUTLET—FEET.	SURFACE AREA AT EACH.....FEET OF DEPTH AT OUTLET—ACRES.	CAPACITY—ACRE-FEET.

(c) Headgate: Width, ... feet; height, ... feet. Material.....

(d) Canal: Total length, ... miles.

LOCATION BELOW HEADGATE	DEPTH	BOTTOM WIDTH	WIDTH AT WATER LINE	GRADE PER MILE.
At mile	feet	feet	feet	feet
At mile	feet	feet	feet	feet
At mile	feet	feet	feet	feet
At mile	feet	feet	feet	feet
At mile	feet	feet	feet	feet

(Give dimensions where reductions in size are made.)

10. Time required for completion of work, ... years.
11. Time required for complete application of water to the proposed beneficial use, ... years.
12. Choice of newspaper for publication of notice of intention to appropriate .....

State of South Dakota,
County of .....,—ss.

I, ..., being first duly sworn, on my oath, depose and say: That my relation to the above-described undertaking is that of ....., that I have read

(Owner, manager or engineer)

[Printed blanks can be obtained from the State Engineer.]

the above and foregoing statement, and examined the map accompanying the same, and that I know of my own personal knowledge that the matters therein stated and shown are true.

Signed .....

Subscribed and sworn to before me this .... day of ....., 19...

....., Notary Public [or other qualified officer].

Remarks by State Engineer:

.....

State of South Dakota,
County of .....,—ss.

Pierre, South Dakota, ..., 19..

This is to certify that the foregoing application was received at this office at .... o'clock .... M. upon the .... day of ....., 19.., and that after examination it was .....

....., State Engineer.

By ....., Deputy.

Number of permit, ...
Date of first receipt of application.....19...
Date of return to applicant for correction.....19...
Date of receipt of corrected application.....19...
Date from which application may claim right.....19...
Approved ....., 19.., Recorded in Book ...., page .....

This is to certify that I have examined the foregoing application for a permit to appropriate water of the State of South Dakota, and I hereby grant the same as stated herein, subject, however, to the following limitations and conditions:

1st. The equivalent of at least one-fifth of the work above specified is to be completed on or before ....., 19...

2d. The whole of said work is to be completed on or before ....., 19...

3d. The limit of time for proof of beneficial use of water appropriated in accordance herewith is ....., 19...

[Printed blanks can be obtained from the State Engineer.]

4th. The water appropriated shall be used for the purpose of .....

5th. The prior right of all persons who, by compliance with the laws of the State of South Dakota, have acquired a right to the use of water must not be injuriously affected by this appropriation.

6th. The amount of the appropriation herein granted shall not exceed ..... cubic feet of water per second of time; neither shall it exceed the capacity of the above-described system of diversion works, nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of the best husbandry; and further, said appropriation must be limited to not more than one-seventieth (1/70) of one cubic foot of water per second of time for each acre of land to which water is actually and beneficially applied on or before ....., 19..; said water to be used during the following described annual periods.

.....

Witness my hand this .... day of ....., 19...

....., State Engineer.

By ....., Deputy.

(Indorsed:) No. ..... Division No. ...., ... District. Permit to appropriate water from ....., ... County, South Dakota. Name of applicant, ... Name of diversion works, ... Date of first receipt at office of State Engineer, ..., 19... Returned to applicant for correction, ..., 19... Corrected application received, ..., 19... Date of water-right ....., 19... Recorded in Book ...., page ..... One-fifth of work to be completed, ..., 19... Whole work to be completed, ..., 19... Final proof of use of water, ..., 19... Approved ....., 19... ....., State Engineer. By ....., Deputy.

[Printed blanks can be obtained from the State Engineer.]

No. .....

Published Notice of Application.

(First Publication ....., 19...)

APPROPRIATION OF WATER.

Office of the State Engineer,

Pierre, S. D., ..., 19...

Notice is hereby given that ....., whose postoffice address is ....., ... County, S. D., has made an application in accordance with the provisions of the irrigation laws of South Dakota for a permit to appropriate for beneficial use ..... cubic feet of water per second of time from....., through the ....., the point of diversion of which is to be located upon the ..... bank of said stream in the ..... ¼ of the ..... ¼ of section ....., township ....., range ....., said water to be used for the purpose of ....., upon the .....

This application will be taken up by the State Engineer at his office at Pierre for consideration and appropriate action upon the .... day of ....., 19.., at 9 A. M., at which time all persons who believe that the prior rights would be injuriously affected, or that the allowance of the permit would be detrimental to the public welfare, and also parties making the application, and to be benefited, are notified to be present either by sworn affidavit or in person for the purpose of presenting any relative testimony.

....., State Engineer.

No. .....

Proof of Publication.

State of South Dakota,
County of .....,—ss.

....., being duly sworn, deposes and says the annexed printed copy of Notice Intention to Appropriate Water

[Printed blanks can be obtained from the State Engineer.]

was taken from the ....., a newspaper which during the whole time of publication of said notice hereinafter stated has been and is printed and published in the ..... of ....., County of ..... and State of South Dakota; that the said notice was published in said newspaper on the following dates:....., in each and every issue of the full number thereof, the first publication being made on the .... day of ....., 19.., and the last publication on the .... day of ....., 19.., upon which days or times of publication aforesaid the newspaper was regularly published, and that during the whole time of said publication he was ..... the printer.. and publisher.. of the said newspaper.

.....

Subscribed and sworn to before me this .... day of ....., A. D. 19...

....., Notary Public ..... County, S. D.

Permit No. .....

Water Division No. ....., ... Water District.

Notice of Completion of Works.

(This blank must be filled out by the holder of permit and forwarded to the State Engineer at least sixty days before the time set for completion of works.)

(P. O.)....., (Date) .....

To the State Engineer of South Dakota, Pierre:

Dear Sir: Notice is hereby given of the completion of the works for the diversion of ..... second-feet of the waters of the State from ....., through the ....., for ..... purposes, ... in accordance with the terms and conditions of a certain permit heretofore issued by the State Engineer of the State of South Dakota.

1. The name of the person or corporation holding said permit is .....

[Printed blanks can be obtained from the State Engineer.]

2. The postoffice address of such person or the place of business of such corporation is ....., County of ....., State of .....

3. The number of such permit is ....., and the date set for the completion of such work is .....

4. Said water to be used for ..... purposes.

5. Said works of diversion will be fully completed on the date set for such completion, and the amount of water which said works are capable of conducting to the place of intended use, in accordance with the plans accompanying the application for such permit, is ..... cubic feet per second.

6. The amount of land for which said water is available is ..... acres, particularly described as follows:

.....

(In case of all canals or other works designed to divert and carry more than fifty cubic feet of water per second, the following certificate must be signed by a well known and competent engineer.)

I hereby certify that the facts set forth in the above notice are true.

.....,
Engineer.

(Signature.).....
.....
.....
.....

(Indorsed:) No. ...., Water Div. No. ...., ... Water Dist. Notice of Completion of Works. Received, ... Date of proof, ... Place, ... Notice sent to .....

Permit No. .....

Water Division No. ....., ... Water District.

Certificate of Examination of Works.

REPORT OF EXAMINING ENGINEER.

To the State Engineer, Pierre, South Dakota:

Dear Sir: I hereby certify that in accordance with your letter of authorization dated ....., 19.., I have this day made a

[Printed blanks can be obtained from the State Engineer.]

thorough examination of the diversion works constructed by ....., of ..... County, South Dakota, holder.. of permit No. ....., issued upon application No. ....., bearing date of priority of ....., 19.., authorizing the diversion of ..... second-feet of the waters of ..... for ..... purposes. I have to report on the condition of the same as follows:

The diversion works comprise:.....

.....

and the system is in the following condition:.....

.....

The point of diversion is located .....

.....

The works are capable of diverting and conveying to the place of use ..... second-feet of water, which is to be used for .....

The legal subdivisions to be irrigated are:.....

.....

comprising a total of ..... acres of land.

The domestic use intended comprises:.....

.....

The utilization for power, mining, or other beneficial uses comprises: .....

.....

Witness my hand this .... day of ....., A. D. 19...

....., Examining Engineer.

(Indorsed:) Permit No. ..... Water Div. No. ...., ... Water Dist. Certificate of Examination of Works. Dated ....., 19... Stream, ... County, ... Amount, ... second-feet. Date of priority, ... Recorded in Book ...., page ..... Filed in the office of the State Engineer this .... day of ....., A. D. 19... ....., State Engineer. By ....., Deputy.

[Printed blanks can be obtained from the State Engineer.]

Permit No. .....

Water Division No. ....., ... Water District.

Certificate of Construction of Works.

TO ALL WHOM IT MAY CONCERN:

This is to certify, that ....., of ....., County of ....., and State of ....., the holder.. of Permit No. ....., issued upon Application No. ....., bearing date of priority of ....., authorizing the diversion of ..... second-feet of the waters of ....., County of ....., State of South Dakota, at ....., for ..... purposes, ha.. fully complied with the provisions of the laws of the State of South Dakota relating to proof of completion of the works of diversion set out and described in said permit; that said works are adequate for diverting and conveying to the place of intended use ..... second-feet of water; and that the lands proposed to be irrigated by the use of said water are described as follows, to wit: .....

.....

Witness my hand this .... day of ....., A. D. 19...

.....,

State Engineer of South Dakota.

(Indorsed:) Permit No. ..... Water Div. No. ...., ... Water Dist. Certificate of Completion of Works. Dated ....., 19... Stream, ... County, ... Amount, ... Date of priority, ... Recorded in Book .... of ...., page .....

[Printed blanks can be obtained from the State Engineer.]

Permit No. .....

Water Division No. ....., ... Water District.

Notice of Application of Water to Beneficial Use.

(This blank must be filled out by holder of permit and forwarded to the State Engineer at least sixty days before the time set for application of water.)

(P. O.) .....,

(Date).....

To the State Engineer of South Dakota, Pierre:

Dear Sir: Notice is hereby given that on the .... day of ....., 19.., at ....., County of ....., State of South Dakota, before ....., proof

(Examining Engineer or Officer)

will be submitted of the application to beneficial use of ..... cubic feet per second of the waters of ....., in accordance with the terms and conditions of permit No. ....., heretofore issued by the State Engineer of South Dakota.

1. The name and postoffice address of the person or corporation holding said permit are .....

.....

2. The use to which said water has been applied is.....

.....

3. The amount applied to beneficial use is.....

4. The place where said water is used is (if for irrigation, give full and accurate description of the lands irrigated).....

.....

5. The name of the canal or ditch or other works by which said water is conducted to such place of use is.....

.....

6. The right to take the water from such works is based upon permit No. .....

7. The source of supply from which such water is diverted is

.....

8. The date of priority which said user is prepared to establish is .....

.....

(Sign).....

[Printed blanks can be obtained from the State Engineer.]

(Indorsed:) Permit No. ..... Water Div. No. ...., ... Water Dist. Notice of Application of Water. Received, ... Date of Proof, ... Place, ... Notice sent to .....

Permit No. .....

Water Division No. ....., ... Water District.

Certificate of Application of Water to Beneficial Use—Deposition of Holder.

Question 1. State your name, residence, occupation and postoffice address.

Ans.....

Ques. 2. If acting in behalf of a corporation, state its name, principal place of business (if a foreign corporation, give name and postoffice of statutory agent), your position with reference to same, and your authority for appearing in its behalf.

Ans.....

Ques. 3. State number and date of permit, and date of priority you propose to establish under the permit.

Ans.....

Ques. 4. State source of water supply and give exact location of point of diversion.

Ans.....

Ques. 5. Describe your works of diversion, and state amount of water they are capable of conveying from point of diversion to place of use, and give name of canal or ditch or other works by which water is conducted to such place of use.

Ans.....

Ques. 6. State for what purpose water is used and describe place of use. (If for irrigation, name each subdivision in which used, and number of acres in each subdivision that have actually been irrigated with said water.)

Ans.....

Ques. 7. If for other than irrigation purpose, state how applied, amount of horse-power generated, etc.

Ans.....

[Printed blanks can be obtained from the State Engineer.]

Ques. 8. What is the minimum amount of water required for the use specified above?

Ans.....

Ques. 9. If you are not the person or representative of the corporation to whom above-mentioned permit was originally issued, please state how ownership was acquired by present holder.

Ans.....

Ques. 10. State when, how, in what amount and to what extent the water diverted under above-mentioned permit has been used.

Ans.....

(Sign.).....

I hereby certify that the foregoing testimony was read to the above subscriber before its signing, that I believe him to be the person he represents himself to be, and that said testimony was subscribed and sworn to before me, at my office in ....., County of ....., State of South Dakota, on this .... day of ....., A. D. 19..

.....

.....

(Indorsed:) Permit No. ..... Proof of Application of Water to Beneficial Use. Deposition of Holder. Amount of water, ... second-feet. Source, ... County, ... Purpose, ... Place of use, ... Date of priority, ... Received and filed, ...

Water License No. .....

Whereas, on the .... day of ....., A. D. 19.., ..., of ....., County of ..... and State of ....., duly made application (No. .....) to me for a permit to use ..... cubic feet per second of the waters of ....., County of ....., State of South Dakota, for ..... purposes; and

Whereas, on the .... day of ....., A. D. 19.., Permit No. ..... was issued to said applicant.. for the diversion of

[Printed blanks can be obtained from the State Engineer.]

said water, and providing for the completion of the works of diversion therein described on or before the .... day of ....., A. D. 19.., and for the application to beneficial use of said water on or before the .... day of ....., A. D. 19..; and,

Whereas, on the .... day of ....., A. D. 19.., the holder.. of said permit duly made proof of the completion of adequate works for the diversion of ..... cubic feet per second of said waters, as evidenced by my Certificate No. ....., dated ....., confirming the completion of works of sufficient capacity for diverting and conveying to the place of intended use ..... cubic feet per second of water, with date of priority of .....; and,

Whereas, on the .... day of ....., A. D. 19.., proof was duly made of the application to beneficial use of ..... cubic feet per second of said water;

.....

.....

Now, therefore, by virtue of the authority vested in me by the laws of the State of South Dakota, I hereby grant and confirm to ....., of ....., the holder.. and owner.. of said permit No. ....., a water-right, dating from ....., to the use of ..... cubic feet per second of the waters of ....., in the county of ..... and State of South Dakota, or so much thereof as may be necessary for the purposes hereinbelow mentioned, to be diverted at ....., and conducted to and upon ....., for the purpose.. of ....., subject, however, to the laws of the State of South Dakota applicable to a license for the use of the waters of the State, and subject, also, to the local or community customs, rules and regulations which have been or may be adopted from time to time by a majority of the users from a common source of supply, canal or lateral from which such water may be taken, when such rules and regulations have for their object the economical use of such water.

Witness, my hand and the seal of my office at Pierre, South Dakota, this .... day of ....., A. D. nineteen hundred and .....

.....,

State Engineer.

[Printed blanks can be obtained from the State Engineer.]

(Indorsed:) State of South Dakota. Water license No. ..... To ..... Source of supply, ..., ... County. Amount, ... sec. feet. Point of diversion, ... Place of use. ..... Purpose, ... Date of priority, ... Recorded ....., in Book .... of ...., page .....

Dry-draw Filings (Under the Act of 1911).

LOCATION NOTICE.

KNOW ALL MEN BY THESE PRESENTS: That ....., whose postoffice is ....., South Dakota, a citizen of the United States, above the age of twenty-one years, being in possession of the following described land, to wit: ....., section ....., township ....., range ....., B. H. M., in ..... County, South Dakota. Said land comprising Desert Entry No. ....., ... Land District, availing ....self of the right granted ..... under the provisions of Section 31 of Chapter 180 of the Session Laws of South Dakota of 1907, has located and claims the right to construct a certain dam across a dry-draw situated in the ..... ¼ of the ..... ¼ section, ... township ....., range ....., B. H. M., and has located and claims the right to construct ditches and flumes for the purpose of directing flood waters from said dam for irrigation of the land first above described, and claims the right of way across any land for the purpose of conveying water for said purpose.

Said locator claims for the above purpose ..... cubic feet of water per second during the following described annual periods, ..., inclusive, each year.

The location of the point of diversion of the reservoir is as follows:

From the .....

.....

The ditch ..... will run in a ..... direction to and on said land for a distance of ..... feet.

Said location was made on the .... day of ....., 19...

Witness my hand and seal this .... day of ....., 19..

.....,

Locator.

[Printed blanks can be obtained from the State Engineer.]

State of South Dakota,
County of ..... ,—ss.

On the .... day of ....., 19.., before me, ..., a notary public in and for the County and State aforesaid, personally appeared ....., to me personally known to be the person who executed the foregoing instrument and acknowledged that he executed the same for the uses and purposes therein set forth.

Witness my hand and official seal the day and date above written.

.....,
Notary Public.

Pierre, South Dakota, ..., 19...

This is to certify that the foregoing location notice was received at this office at .... o'clock .... M., upon the .... day of ....., 19.., and after examination it was .....
.....
.....,
State Engineer.

(Indorsed:) Filing No. ..... Water Div. No. ...., ... Water Dist. Location Notice. Dated ....., 19... Stream. ..... County, ... Amount, ... second-feet. Date of priority, ... Recorded in Book ...., page ..... Filed in the office of the State Engineer this .... day of ....., A. D. 19... ....., State Engineer. By ...., Deputy.

Dry-draw Filings (Under the Act of 1911).

PROOF OF APPLICATION OF WATER TO BENEFICIAL USE.

Location No. .....

Water Division No. ....., ... Water District.

Petition of Holder.

Question 1. State your name, residence, occupation and post-office address.

Ans.....

[Printed blanks can be obtained from the State Engineer.]

Ques. 2. If acting in behalf of a corporation, state its name, principal place of business (if a foreign corporation, give name and postoffice of statutory agent), your position with reference to same, and your authority for appearing in its behalf.

Ans.....

Ques. 3. State date of posting and date of recording notice of appropriation.

Ans.....

Ques. 4. State source of water supply and give exact location of point of diversion.

Ans.....

Ques. 5. Describe your works of diversion giving length and height of each dam and state amount of water they are capable of conveying from point of diversion to place of use, and give name of canal or ditch or other works by which water is conducted to such place of use, and date of completion of same.

Ans.....

Ques. 6. State for what purpose water is used and describe place of use. (If for irrigation, name each subdivision in which used, and number of acres in each subdivision that have actually been irrigated with said water.

Ans.....

Ques. 7. If for other than irrigation purpose, state how applied, amount of horse-power generated, etc.

Ans.....

Ques. 8. What is the minimum amount of water required for the use specified above?

Ans.....

Ques. 9. If you are not the person or representative of the corporation to whom above-mentioned permit was originally issued, please state how ownership was acquired by present holder.

Ans.....

Ques. 10. State when, how, in what amount and to what extent the water diverted under above-mentioned permit has been used.

Ans.....

(Sign).....

[Printed blanks can be obtained from the State Engineer.]

I hereby certify that the foregoing testimony was read to the above subscriber before its signing, that I believe him to be the person he represents himself to be, and that said testimony was subscribed and sworn to before me, at my office in ....., County of ....., State of South Dakota, on this .... day of ....., A. D. 19...

.....

.....

.....,

.....,

Witnesses.

I, the undersigned, do hereby certify that I am a duly qualified elector residing in the immediate vicinity of the diversion works designated in the foregoing testimony, that I have no interest in the works, water or land above described, that I have read the foregoing testimony and that I know of my own personal knowledge that the matters therein stated are true.

.....

.....

(Indorsed:) Location No. ..... Proof of Application of Water to Beneficial Use. Petition of Holder. Amount of water, ... second-feet. Source, ... County, ... Purpose, ... Place of use, ... Date of recording, ... Received and filed, ...

Dry-draw Certificate.

(This certificate is under the Act of 1907. Under the Act of 1911 no different form has yet been adopted.—THE AUTHOR.)

State of South Dakota,
County of Hughes,—ss.

This certifies that ....., whose postoffice address is ....., ... County, South Dakota, has filed in this office a location notice of a certain dam for impounding flood waters, in accordance with the provisions of section 31 of chapter 180, of the Session Laws of 1907, relating to the filing of water-rights upon dry-draws or watercourses. Said dam is located in the

[Printed blanks can be obtained from the State Engineer.]

..... ¼ of the ..... ¼, of section ....., township ....., range ..... E., B. H. M.

The lands to be irrigated comprise ..... acres in the ....., as shown by the map accompanying said location notice; said lands comprise Desert Entry No. .....

The said ..... has furnished this office proof of completion of ..... irrigation system and of the application of the water to beneficial use and ..... is hereby authorized to use sufficient water to irrigate the lands herein designated.

Witness my hand and official seal, this .... day of ....., 19...

....., State Engineer.

[Printed blanks can be obtained from the State Engineer.]

(3d ed.)

§ 1469. UTAH FORMS.

(1911.)

Irrigation—Application to appropriate water.
Application for other purposes.
Irrigation—Proof of appropriation of water.
Certificate of appropriation of water.

(The State Engineer's office also issues a pamphlet containing rules and regulations.—THE AUTHOR.)

File No. .....

Irrigation—Application to Appropriate Water.

(Before filling this blank, carefully read "Rules and Regulations" on the back hereof, and the notes in the body of it.)

....., 19...

For the purpose of acquiring the right to use a portion of the unappropriated water of the State of Utah, for irrigation purposes, application is hereby made to the State Engineer, based upon the following showing of facts submitted in accordance with the requirements of the Compiled Laws of Utah, 1907, as amended by the Session Laws of Utah, 1909.

(NOTE.—The information given in the following blanks should be free from explanatory matter, but when necessary a complete supplementary statement should be made under the heading "Explanatory.")

1. The name of the applicant is .....
2. The postoffice address of the applicant is .....
3. The flow of water to be used in cubic feet per second is .....

3a. The quantity of water to be appropriated is (see note under explanatory) ..... acre-feet.

4. The water is to be used each year from .... to ....
Month Day Month Day

4a. The water is to be stored each year from .... to ....
Month Day Month Day

5. The river system or drainage area to which the direct source of supply belongs is .....

(Leave blank.)

[Printed blanks can be obtained from the State Engineer.]

6. The direct source of supply is ..... in the above-named river system (drainage area) in ..... County.

7. The point of "diversion" or "point of issuance" of spring is situated at a point [NOTE.—If the water is taken from a spring at its point of issuance the words "point of diversion or" should be stricken out. If the water is taken from a stream the words "or point of issuance of spring" should be stricken out.]

.....

(NOTE.—The "point of diversion" "or point of issuance" of spring must be located by course and distance or by rectangular distances with reference to some United States land corner or United States mineral monument, if within a distance of six miles of either, or if a greater distance to some prominent and permanent natural object.)

8. The diverting works will consist of .....

.....

9. The cross-section of the diverting channel will be ⊔ ⌣ O

(Strike out the ones not needed.)

10. The nature of the diverting channel will be: earth, wood, iron, concrete.

(Strike out the ones not needed.)

11. The length of the diverting channel will be ..... feet.

12. The top width of the diverting channel will be (if a ditch) ..... feet.

13. The bottom width of the diverting channel will be (if a ditch) ..... feet.

14. The width of the diverting channel will be (if a flume) ..... feet.

15. The depth of water in the channel will be (if a ditch) ..... feet.

15a. The depth of water in the channel will be (if a flume) ..... feet.

16. The diameter of the diverting channel will be (if a pipe) ..... inches.

17. The grade of the diverting channel will be ..... feet per mile.

18. The legal subdivisions of the land to be irrigated are as follows:

.....

Total area ..... acres.

19. The character of the soil in the above tract of land is .....

[Printed blanks can be obtained from the State Engineer.]

20. The character of the subsoil in the above tract of land is .....

EXPLANATORY.

NOTE.—Never use 3a except when it is intended to store the water to be appropriated; in such case the volume of water to be stored should be given in acre-feet in that space. The time during which it is to be released and used should be set forth in 4, and the time during which it is to be stored stated in 4a. The lands to be inundated by the reservoir must be described in the space below this note as nearly as may be, and by Government subdivisions if upon surveyed land. The area of reservoir when at full stage should be given in acres in the same space. If the water is released from the reservoir into the natural channel of the stream, the point where it is diverted from such stream should be described in 7, and the center of the impounding dam described in the space below this note in accordance with the note given in 7. The data given in 8 to 17, inclusive, should be relative to the works used to divert the water from the natural channel. All other works should be described in the space below this note, except where the water is not stored in the natural channel of the stream supplying it; in such case, the point of diversion is the place where the water is taken from the supplying source and should be described in 7; and 8 to 17, inclusive, should be used to describe the diverting works. It is permissible to appropriate water from more than one source, provided the water from the sources specified is taken to one place and is used for one purpose. In case the application is made for the water from a number of springs, the point where the water is collected should be described as the point of diversion and the works below it described as the diverting works; those above it as the collecting works. Each spring should also be described in accordance with note in 7. In case two or more streams are specified as the direct sources of supply, the point where the water is diverted from each stream must be described in accordance with note in 7. The quantity of water diverted from each such stream should also be specified in the space below this note, if only approximately.

The following additional facts are set forth in order to more clearly define the full purpose of the proposed appropriation .....

.....,

Signature of applicant.

Application to Appropriate Water.

STATE ENGINEER'S INDORSEMENTS.

Dates:

1. ..... Application received at State Engineer's office.

2. ..... Application examined and .....

3. ..... Application returned to ..... for correction.

4. Reason for returning application .....

.....

[Printed blanks can be obtained from the State Engineer.]

5. ..... Corrected application returned to State Engineer's office .....

6. ..... Corrected application examined and .....

7. ..... Application rejected and returned to applicant .....

8. Reason for rejecting application .....

.....

9. Application approved and returned to applicant .....

10. (a) This application is approved on condition and it is hereby required that actual construction work shall begin within six months and be fully completed by ....., (b) and that the water, a right to the use of which is herein sought, shall be applied to the beneficial use set forth by .....

....., State Engineer.

STATE ENGINEER'S MEMORANDA.

Dates:

1. ..... Fee for filing application paid, $.....

2. ..... Cost of publishing notice deposited, $.....

3. ..... Publication began and was completed.....

4. ..... Notice published in .....

5. ..... Application protested by .....

6. ..... Protest considered .....

7. ..... Fee for recording and approving application paid $2.50.

8. ..... Time for beginning work extended to .....

9. ..... Time for making proof of completion of works extended to .....

10. ..... Time for making proof of beneficial use of water extended to .....

11. I hereby certify the foregoing is a true copy of the application made by ..... to appropriate water and of the indorsements thereof as shown by the records of my office on the date given below.

....., State Engineer.

Salt Lake City, Utah, ..., 19...

File No. ..... Recorded ....., 19...

[Printed blanks can be obtained from the State Engineer.]

STATE ENGINEER'S RULES AND REGULATIONS.

All applications must be dated at place where made and signed by applicant.

Erasures must not be made on applications, but any matter be eliminated from them by running a red line through it.

All corrections on applications returned for that purpose must be made in red ink and be plainly written.

Applications returned to applicants for correction must be resubmitted to this office within sixty days from the date noted in 3 under State Engineer's indorsements, or the priority determined by the original receiving date will be lost; applications resubmitted after the expiration of sixty days will be treated as new applications in all respects. Subdivision (a) under 10 of State Engineer's indorsements is interpreted to mean that the diversion works and the main diverting channel or channels commanding the area to be irrigated are to be completed within the time specified; the subdivision (b) in the same paragraph, is interpreted to mean that within the time specified therein all of the laterals and devices necessary for the application of the water to a beneficial use must be completed and that the land to be irrigated must either have produced crops by irrigation or be cleared and in such condition as would permit of the successful production of crops on the application of water. See section 1288x7, Compiled Laws of Utah, 1907, or Section 1288x7, Chapter 62, Session Laws of Utah, 1909.

No application or other paper pertaining to an application will be marked "received" until the required fees have been paid.

Applicants will be informed by this office when the cost of publishing notice of application is due.

Applicants must advance cost of publication within ten days after having been so informed.

Request for extension of time for completion of construction or for application to a beneficial use will not be considered unless accompanied by sufficient affidavit and required fee.

Do not "back" the application or make any indorsements on page 3.

FEES REQUIRED BY LAW FOR STATE TREASURY.

For examining and filing applications to appropriate 10 cubic feet per second of water or less, $2.50.

For examining and filing applications to appropriate one hundred twenty-five acre-feet of water or less, $2.50.

For examining and filing applications to appropriate more than 10 cubic feet per second of water a fee of $2.50 plus $1.00 for each cubic foot per second in excess of that flow.

For examining and filing applications to appropriate more than one hundred twenty-five acre-feet of water a fee of 2 cts. for each acre-foot.

Provided, however, that when a filing fee of any application to appropriate water shall exceed $1,000.00 the balance of the fee in excess of $1,000.00 may, at the option of the applicant, be paid at the time the proof of completion of the works is submitted.

For approving and recording completed applications, $2.50.

For examining and filing written proofs of completion of works, $1.00.

For examining and filing written proofs of beneficial use of water, $1.00.

For examining and filing map, profile, and drawings that are part of the proof of completion of works, $5.00.

For examining and filing map, profile, and drawings that are part of the proof of beneficial use of water, $5.00.

For issuing a certificate of appropriation, $1.00.

For filing an affidavit or any other paper, $1.00.

NOTE.—Applicants will save time and expense by familiarizing themselves with the law before making applications.

[Printed blanks can be obtained from the State Engineer.]

(Indorsed:) No. ..... Application of ..... to Appropriate Water from ..... for Irrigation Purposes. Recorded in Book .... of Applications to appropriate water, on pages .... to .....

Application for Other Purposes.

(Similar forms, with some variation, may be had for power, stock-watering, domestic use, mining, etc.—THE AUTHOR.)

Irrigation—Proof of Appropriation of Water.

NOTE.—Before filling this blank, carefully read the pamphlet "Rules and Regulations" also "Rules and Regulations" on the back hereof and the notes in the body of this blank. This will save time and expense to the appropriator.

State of Utah,
County of .....,—ss.

I, ..., being first duly sworn, do hereby certify that I am the person, assignee or the ..... of ....., who or which made an application to appropriate water from ..... in ..... river system or drainage area in .....
(Leave blank)
County, for irrigation purposes; that said application is filed in the State Engineer's office as No. .....; that the works necessary to accomplish the diversion and perfect the appropriation of water in accordance with the said application have been completed; that the following statement of facts is submitted in proof of the completion of said works and the appropriation of said water; that I made the said statement and that each and all of the items contained therein are true.

In witness whereof, I have hereunto set my hand this .... day of ....., 19...

.....,
Signature of Appropriator.

Subscribed and sworn to before me this .... day of ....., 19...

.....,
Notary Public.

[Printed blanks can be obtained from the State Engineer.]

STATEMENT.

1. Name of appropriator is .....

2. Postoffice address of appropriator is .....

3. The river system or drainage area to which the direct source of supply belongs is .....

(Leave blank)

4. The direct source of supply is ..... in the above-named river system (drainage area).

5. The "point of diversion" or "point of issuance" of spring is situated at a point .....

.....

6. The diverting works consist of .....

7. Name of canal, ditch, pipe-line, conduit, or other diverting channel (if named) is .....

.....

8. The cross-section of the diverting channel is ⊔ ⌣ O

(Strike out the ones not needed.)

9. The nature of the diverting channel is earth, wood, iron, concrete.

(Strike out the ones not needed.)

10. The length of the diverting channel is ..... feet.

11. The top width of the diverting channel is (if a ditch) ..... feet.

12. The bottom width of the diverting channel is (if a ditch) ..... feet.

13. The effective depth of the diverting channel is (if a ditch) ..... feet.

14. The width of the diverting channel is (if a flume) ..... feet.

15. The effective depth of the diverting channel is (if a flume) ..... feet.

16. The diameter of the diverting channel is (if a pipe) ..... inches.

16a. The water is used each year from ..... to ....., inclusive.

17. The grade of the diverting channel is ..... feet per mile.

18. Construction of works was commenced* [See rules and regulations on the back hereof], 19...

*NOTE.—Date given in 18 should be when the first work was done subsequent to approval of appropriation.

[Printed blanks can be obtained from the State Engineer.]

19. Construction of works was completed .....19...

20. Works was first used to divert and carry water ....., 19...

21. The flow of water appropriated is ..... cubic feet per second.

22. The quantity of water appropriated is ..... acre-feet.

23. The method employed in measuring the water was .....

(Give details of measurements under "General Remarks.")

24. Description of land irrigated is as follows: .....

(See Rules and Regulations on the back hereof.)

.....

NOTE.—Only such land as is actually irrigated or cleared and in a condition that it will successfully produce ordinary agricultural crops on the application of water must be specified or described.

25. Total area of land irrigated ..... acres.

26. Character of the soil is .....

27. Character of the subsoil is .....

28. Kinds of crops produced are .....

NOTE.—The area of each kind of crop specified in 28 must be stated.

GENERAL REMARKS.

.....

.....

State of Utah,
County of .....,—ss.

..... and ....., having both been duly sworn, each for himself, says that he is personally acquainted with the works constructed by ....., for the diversion and appropriation of water from ....., in ..... river system or drainage area in ..... county for irrigation purposes; that said works have been fully completed and used to the extent and in the manner particularly set forth in the foregoing statement of facts; that he has read said statement, and that each and all of the items therein contained are true.

In witness whereof, each has hereunto set his hand this .... day of ....., 19...

....., Signature of Witness.

....., Signature of Witness.

[Printed blanks can be obtained from the State Engineer.]

Subscribed and sworn to before me this .... day of ....., 19...

[Seal] .....,
Notary Public.

STATE ENGINEER'S INDORSEMENTS.

Dates:

..... Application received at State Engineer's office.
..... Application approved and ..... allowed for completing works.
..... Time for completing works extended to .....19...
..... Proof of appropriation received at State Engineer's office.
..... Proof of appropriation examined and .....
..... Proof of appropriation returned for correction.
..... Corrected proof of appropriation resubmitted.
..... Corrected proof of appropriation examined and.....
.....
..... Maps, profiles and drawings received at State Engineer's office.
..... Maps, profiles and drawings examined and .....
.....
..... Maps, profiles and drawings returned for correction.
..... Corrected maps, profiles and drawings resubmitted.
..... Corrected maps, profiles and drawings examined and
.....
..... Certificate of appropriation issued (No. .....).

STATE ENGINEER'S MEMORANDA.

..... Fee for examining and filing proof of appropriation received $1.00.
..... Fee for examining and filing maps, profiles and drawings received $5.00.
..... Fee for issuing certificate of appropriation received $1.00.

STATE ENGINEER'S RULES AND REGULATIONS.

Maps, profiles and drawings shall accompany the written proof of appropriation of water and the written proof of completion of works. Maps shall accompany the written proof of application of water to a beneficial use. They must be in accordance with the rules and regulations published in pamphlet form by the State Engineer.

[Printed blanks can be obtained from the State Engineer.]

No proof of appropriation will be marked "received" until the fees have been paid and the maps, profiles, and drawings submitted.

Erasures must not be made on proofs of appropriation returned for correction.

Proofs of appropriation returned for correction must be resubmitted within the time allowed by the State Engineer indorsed hereon.

The engineer who prepares the maps, etc., must be one of the disinterested witnesses to inspect the work and make a sworn statement relative to the accuracy of the proof of the appropriation. But such sworn statement shall not be made until after proof of appropriation has been submitted to the State Engineer's office and accepted as sufficient.

At least one measurement of the actual flow or quantity of water appropriated should be given in No. 21 or No. 22.

It is desirable that a series of such measurements be made and the results given under "General Remarks." The method of measurement should be given as by meter, weir, etc. Sufficient data must be given of all measurements to enable the State Engineer to calculate the flow.

In No. 24 only such lands as are under actual irrigation or cleared and in condition to successfully produce ordinary agricultural crops on the application of water should be included. It must be described by metes and bounds.

LIST OF FEES REQUIRED BY LAW FOR STATE TREASURER.

(See first form.—THE AUTHOR.)

(Indorsed:) Proof of Appropriation Relative to Application No. ...., Made by ..... to Appropriate Water from ..... for Irrigation Purposes.

(Original.)

Certificate of Appropriation of Water.

Certificate No. ....B. Application No. ..... Priority No.....B. ..... Water Division.

Whereas, it has been made to appear to the satisfaction of the undersigned, State Engineer of the State of Utah, that the appropriation of water from the ..... Water Division, made by ....., has been perfected in accordance with the application therefor, dated ....., 19.., and recorded in the office of the State Engineer, on page ...., in Book .... of the record of applications to appropriate water; wherefore, be it known that I, ..., State Engineer of the State of Utah, under and by authority and direction of the provisions of Chapter 108 of the Session Laws of Utah of 1905, as amended by Chapter 156 of the Session Laws of Utah, 1907, and Chap-

[Printed blanks can be obtained from the State Engineer.]

ter 62 of the Session Laws of Utah, 1909, on "Water Rights and Irrigation," do hereby certify that the said ..... of ....., in ..... County, State of Utah, is entitled to the use of ..... cubic feet of water per second, subject to the following restrictions, to wit:

.....

.....

The date of the appropriation is ....., 19.., and the priority number of the right is No. .....B.

In witness whereof, I have hereunto set my hand and affixed the seal of my office this .... day of ....., A. D. 19...

....,
State Engineer.

(Endorsed:) Certificate of Appropriation of Water. ..... Water Division, Certificate No. ....B, Priority No. ....B. To ..... For ..... Filed for record this .... day of ....., 19.., at .... o'clock .... M., and recorded in Book .... of Water ...., page ...., Recorder ..... County, Utah. This certificate must be filed for record with Recorder of ..... County, Utah, within thirty days from its date.

[Printed blanks can be obtained from the State Engineer.]

(3d ed.)

§ 1470. WYOMING FORMS.

(1911.)

State Engineer's instructions and suggestions to applicants for permits to appropriate water.

Application for a permit to divert and appropriate the water of the State of Wyoming.

Enlargement—Application for a permit to divert and appropriate the water of the State of Wyoming.

Application for a permit to construct the ——— Reservoir, and to store the unappropriated water of the State of Wyoming.

Ditch proof of appropriation of water.

Reservoir proof of appropriation of water.

(Adjudication) proof of the appropriation of water.

Certificate of appropriation of water.

State Engineer's Instructions and Suggestions to Applicants for Permits to Appropriate Water.

General.

The right to use water develops by degrees. The first step is the survey. Care in this work gives the best kind of insurance to the builder or investor in irrigation enterprises. The application for permit and accompanying maps and plans can then be prepared. These are sent to the State Engineer's Office and, when approved, the application becomes a permit. This is the first degree in the history of the water-right. The right is only recognized at this stage as initiated and its principal standing is from the administrative standpoint. As construction proceeds, and as water is used for a beneficial purpose, the public at large begins to recognize the water-right. When the terms of the permit are completely complied with, proof of use of water is submitted to the Division Superintendent. He in turn transmits the proof to the Board of Control, from which a certificate of appropriation is issued. The operations of the Division Superintendent are all of a public character and the public is notified as to each step taken. The final certificate of appropriation is the evidence of public recognition of the right to use water. This is the second and last degree in the procedure.

Law.

Sections 917 to 927 and 931 to 933 of the Revised Statutes of Wyoming, 1899, and chap. 69, S. L. 1903, as amended, govern the filing and approval of such applications.

The law governing the fees to be charged is found in section 108, Revised Statutes of Wyoming, 1899.

An abstract of these requirements and the rules of this office are given below:

Applications.

Applications must be made upon the blank form approved by the State Engineer and all blank spaces are to be filled. Applications to enlarge exist-

[Printed blanks can be obtained from the State Engineer.]

ing ditches, or to increase the acreage watered therefrom, must be made on an *enlargement* blank, and the entire irrigation system must be shown complete from stream to end of ditch. In giving dimensions, remember the following: "*Width on top*" is the width at surface water-line. *Depth* is the depth of water which the ditch or canal is to carry.

The area to be irrigated must be given from actual measurements on the ground, and where only part of a subdivision is to be watered, application and maps must give the area in each forty-acre tract or fractional subdivisions.

The law requires applications to be made and approved by the State Engineer before work begins. *No application which states that work has begun or has been completed will be approved.*

Maps.

Each application must be accompanied by two maps, *one of which must be on tracing linen.*

These maps must be neatly and accurately drawn with Indian ink to a scale of two inches to the mile, and on sheets not less than nine by twelve inches.

They must show the location of the headgate by courses and distances from some government corner. They must show the actual location of the ditch or canal, and where government survey lines are crossed, the distance to the nearest corner must be given. (Where corners cannot be found, give the location of line by courses and distances.)

The map must show the name and location of stream from which water is to be taken; the location and area of land to be irrigated, or place where water is to be used for other purposes. (This may be done by marking the boundaries or by coloring the areas.)

Whenever the canal line crosses streams or other ditches, the location of such crossings must be shown, and such intersecting streams and ditches must be *marked by ink of a different color.*

Maps must contain the name of the ditch, canal or reservoir, and the post-office of the Surveyor, with date of survey.

Reservoirs and Dams.

Application for reservoirs and dams must be accompanied by a map in duplicate on tracing linen showing the dimensions and location of the reservoir. The dam must be tied to some government corner by courses and distance.

Plans of dams, cribs or embankments must be drawn on longitudinal scale of not less than one inch to two hundred feet, and for cross-sections of not less than one inch to twenty feet. Timber, brush and stone, where used, shall be shown in detailed plans, the scale of which shall be one inch to four feet. The plans for outlet and wasteways for reservoirs shall be drawn on a scale of one inch to four feet, and are required for all dams over five feet high in a running stream or for any other dam over ten feet high.

The maps of reservoirs shall show the total area to be submerged and enough levels to permit of computing its capacity.

For earth dams the slope must not be less than 3 to 1 for the front or water side, and 2 to 1 for the back.

Fees.

For filing and examining applications for permits to appropriate water, $2.00.

For recording statements of claim, $1.50.

For recording applications, for reservoir permits, $1.00.

[Printed blanks can be obtained from the State Engineer.]

For recording any other water-right instrument—for the first one hundred words, $1.00; for each subsequent folio, $0.15.

For issuing certificates of appropriation, $1.00.

For making certified copies of records—for the first one hundred words, $1.00; for each subsequent folio, $0.15.

For making copy of any permit, $1.00; certified copy, $2.00.

For attaching certificate, $1.00.

Note.

Lands may be shown by tinting with a colored pencil on the dull side of the tracing linen and this rubbed to an even tint by means of a medium hard rubber eraser. Where an enlargement application is made, the lands under existing rights through the same ditch should be shown in different colors. Colors which will not blue-print well should not be used. The preferred colors are: Green, Orange, Red and Yellow. Lettering on a map should be sparing, and superfluous matter should not be placed thereon. Indelible pencil or a typewriter should not be used on tracing linen, since the oil in the cloth will cause these colors to spread, and in time it becomes almost obliterated. The affidavit of the surveyor should be neatly lettered on the map. In preparing an application, the forty-acre subdivision, in which the headgate is situated, should be stated; and the bearing and distance to the nearest government corner should be given. In case of an enlargement, if the applicant is the owner of the ditch to be enlarged, he should so state; if not, the written consent of the owners must accompany the application. The following form for consent to enlarge may be used:

....., 19....

I, (or we), ..., the sole owner of the ..... Ditch taking water from ..... under Permit No. ....., do hereby give my (or our) free and voluntary consent to the enlargement or extension of, and to the use of water through, the said ditch by ....., according to the terms of this enlarged permit.

.....

.....

The attention of owners of irrigation works is called to the provisions of Secs. 22-27, Chap. 86, S. L. 1907.

CERTIFICATE OF SURVEYOR.

State of Wyoming,
County of.....,—ss.

I, ..., of ....., hereby certify that this map was made from notes taken during an actual survey made by me on ....., 19...., and that it correctly represents the irrigation works described in the accompanying application, together with a meander of streams, and shows accurately the location and area of the lands proposed to be irrigated in each forty-acre tract.

.....,
Surveyor.

License No. .....

[Printed blanks can be obtained from the State Engineer.]

The State Engineer's Office must be Notified Immediately when you complete your Ditch.

Application for a Permit to Divert and Appropriate the Water of the State of Wyoming.

Water Division No. ....., District No. .....

I, ..., of ....., County of ....., State of ....., being duly sworn according to law, upon my oath say:

1. The name.. of the applicant, ...

.....

2. The postoffice address.. of the applicant.....

3. The use to which the water is to be applied is.....

.....

4. The name of the ditch or canal is .....

5. The source of the proposed appropriation is.....

.....

6. The headgate of the proposed ditch or canal is located

.....

..... of Section ....., Township ....., Range .....

7. The said ditch or canal is to be ..... miles long and to pass through the following lands (give route by courses and distances, or by naming legal subdivisions crossed):

.....

8. The dimensions of said works are:

(a) [At headgate] Width on top (at water-line), ... feet; width on bottom, ... feet; depth of water, ... feet; grade, ... feet per mile.

(b) Give dimensions at each point where reduced in size, stating miles from headgate:

[At .....] Width on top (at water-line), ... feet; width on bottom, ... feet; depth of water, ... feet; grade, ... feet per mile.

[At .....] Width on top (at water-line), ... feet; width on bottom, ... feet; depth of water, ... feet; grade, ... feet per mile.

[At .....] Width on top (at water-line), ... feet; width on bottom, ... feet; depth of water, ... feet; grade, ... feet per mile.

[Printed blanks can be obtained from the State Engineer.]

9. Describe the character of proposed works, stating: 1st. The nature of the material to be moved. 2d. Number and length of tunnels, if any. 3d. Amount of fluming, if any.

.....

10. The estimated cost of said ditch is ..... dollars.

11. The land to be irrigated has a total area of ..... acres, described as follows: (Give estimated acreage in fractions of subdivisions) .....

12. Construction will begin on proposed works on or before ....., 19...

13. The time required for the completion of ditches and other distributing works is ..... year.. from ....., 19...

14. The time required to complete the application of water to the beneficial use stated in this application is ..... year.. from ....., 19...

15. A map of the proposed ditch or canal, prepared in accordance with Chapter 14, R. S. 1899, accompanies this application.

(Signed).....

NOTE.—The statements in the foregoing application must comply with the requirements of Chapter 14, R. S. 1899.

The State of Wyoming,
County of .....,—ss.

I hereby certify that the foregoing application was signed in my presence and sworn to before me by ....., this .... day of ....., 19...

.....

.....

.....

.....

The State of Wyoming,
State Engineer's Office,—ss.

This is to certify that I have examined the foregoing application and have returned the same without my approval for the following reasons:.....

.....

Witness my hand this .... day of ....., A. D. 19...

.....,

State Engineer.

[Printed blanks can be obtained from the State Engineer.]

The State of Wyoming,
State Engineer's Office,—ss.

This is to certify that I have examined the foregoing application and do hereby grant the same subject to the following limitations and conditions:.....

.....

Construction of proposed work shall begin within one year from the date of approval.

The time for completing the work shall terminate on December 31, 19...

The time for completing the appropriation of water for beneficial use shall terminate on December 31, 19...

The amount of the appropriation shall be limited to one cubic foot per second of time for each seventy acres of land reclaimed on or before December 31, 19.., and the additional volume used for ..... purposes on or before said date.

Witness my hand this .... day of ....., A. D. 19...

....,
State Engineer.

(Indorsed:) No. ..... Application for a Permit to Divert and Appropriate the Water of the State of Wyoming. Division No. ...., District No. ..... The State of Wyoming, State Engineer's Office,—ss. This instrument was received and filed for record on the .... day of ....., A. D. 19.., at .... o'clock .... M., and duly recorded in Book .... of Applications, on page .... State Engineer.

[Printed blanks can be obtained from the State Engineer.]

The State Engineer's Office must be Notified Immediately when you complete your Ditch.

Enlargement—Application for a Permit to Divert and Appropriate the Water of the State of Wyoming.

Water Division No. ....., District No. .....

Enlargement of the .....

I, ..., of ....., County of ....., State of ....., being duly sworn according to law, upon my oath say:

1. The location and description of the ditch to be enlarged is as follows:

2. The headgate is situated ..... of Section ....., Township ....., Range .....

3. Said ditch is ..... miles long and passes through the following lands (give legal subdivisions), the same being correctly shown on the map accompanying this application:

.....

4. The dimensions of said ditch are: Width on top (at waterline), ... feet; width on bottom, ... feet; depth of water, ... feet; grade, ... feet per mile.

5. Said ditch now serves to irrigate the following described land:

.....

6. The total area now irrigated from said ditch being..... acres.

7. Application is hereby made for permission to enlarge or extend the use of water through the above-named and described ditch and to divert and appropriate the water of the State as follows:

1. The name.. of the applicant, ...
2. The postoffice address.. of the applicant, ...
3. The use to which the water is to be applied is.....
4. The name of the ditch or canal is.....
*5. The source of the proposed appropriation is .....

.....

and the head of the proposed extension is located ....., Section ....., Township ....., Range .....

*If the proposed work is to be an extension of the original ditch, give the location of the head of the extension by courses and distances from the nearest government corner.

[Printed blanks can be obtained from the State Engineer.]

6. The said ditch or canal as enlarged is to be ..... miles long and to pass through the following lands (give sections, townships and ranges):.....

.....

7. The dimensions of said ditch are to be:

(a) [At headgate] Width on top (at water-line). ..... feet; width on bottom, ... feet; depth of water, ... feet; grade, ... feet per mile.

(b) Give dimensions at each point where reduced in size, stating miles from headgate:

[At .....] Width on top (at water-line), ... feet; width on bottom, ... feet; depth of water, ... feet; grade, ... feet per mile.

[At .....] Width on top (at water-line), ... feet; width on bottom, ... feet; depth of water, ... feet; grade, ... feet per mile.

8. Describe the character of proposed works, stating: 1st. The nature of material to be moved. 2d. Number and length of tunnels, if any. 3d. Amount of fluming, if any.

.....

9. The estimated cost of said enlargement is ..... dollars.

10. The land to be irrigated has a total area of ..... acres, described as follows: (Give estimated acreage in fractions of subdivisions) .....

.....

11. Construction of the proposed enlargement or extension will begin within one year from date of approval of this application.

12. The time required for the completion of enlargement or extension is ..... year.. from ....., 19...

13. The time required to complete the application of water to the beneficial use stated in this application is ..... year.. from ....., 19...

14. A map in duplicate, prepared in accordance with the provisions of Section 35 of the Water Laws, accompanies this application.

(Signed) .....

NOTE.—The statements in the foregoing application must comply with the requirements of Chapter 14, R. S. 1899.

NOTE.—Before applications for the enlargement of ditches can be approved, the written consent of the owners of such ditches must be secured, and this must accompany the application.

[Printed blanks can be obtained from the State Engineer.]

The State of Wyoming,
County of .....,—ss.

I hereby certify that the foregoing application was signed in my presence and sworn to before me by ....., this .... day of ....., 19...

.....
.....
.....
.....

The State of Wyoming,
State Engineer's Office,—ss.

This is to certify that I have examined the foregoing application and have returned the same without my approval for the following reasons: .....
.....

Witness my hand this .... day of ....., A. D. 19...

.....,
State Engineer.

The State of Wyoming,
State Engineer's Office,—ss.

This is to certify that I have examined the foregoing application and do hereby grant the same subject to the following limitations and conditions: .....
.....

Work will begin within one year from date of approval.

The time for completing construction shall terminate December 31, 19...

The time for completing the appropriation of water for beneficial use shall terminate December 31, 19...

The amount of the appropriation shall be limited to one cubic foot per second of time for each seventy acres of land reclaimed on or before ....., 19.., and the additional volume applied to ..... purposes on or before that date.

Witness my hand this .... day of ....., A. D. 19...

.....,
State Engineer.

[Printed blanks can be obtained from the State Engineer.]

(Indorsed:) No. ..... Application for a Permit to Divert and Appropriate the Water of the State of Wyoming. Division No. ...., District No. ..... The State of Wyoming, State Engineer's office,—ss. This instrument was received and filed for record on the .... day of ....., A. D. 19.., at .... o'clock .... M., and duly recorded in Book .... of Enlargements, on page ...., State Engineer.

The State Engineer's Office must be Notified Immediately upon the Completion of These Works.

Application for a Permit to Construct the ..... Reservoir, and to Store the Unappropriated Water of the State of Wyoming.

Water Division No. ....., District No. .....

I, ..., of ....., County of ....., State of ....., being duly sworn according to law, upon my oath say:

1. The name.. of the applicant, ...

.....

2. The postoffice address.. of the applicant, ...

3. The name of stream from which reservoir is to be filled and appropriation made is .....

.....

4. The use to which the water is to be applied is.....

.....

5. The location of the proposed reservoir will be in Sec. ....., T. ..... N., R. ..... W., described as follows:

(a) State whether situated in channel of running stream, and give character of material at outlet:.....

.....

(b) If not in channel of running stream, state how it is to be filled. If through canal, give name and dimensions: .....

.....

(c) The construction of dam, the material of which it is to be built and the method of protecting from waves are as follows:.....

.....

[Printed blanks can be obtained from the State Engineer.]

6. The area of reservoir is ..... acres, with maximum depth of ..... feet and approximate mean depth of water of ..... feet.

7. The dimensions of dam are: Length on top, ... feet. Length on bottom, ... feet. Width on top, ... feet. Width on bottom, ... feet. Depth, ... feet. Slope of front, ... Slope of back, ... Height of dam above water line when full, ... feet.

8. The outlet and wasteway, with dimensions of each, are as follows: .....

.....

9. The outlet of the proposed reservoir is located .....

..... of Section ....., Township ..... North, Range ..... West.

10. The estimated cost of said reservoir is $.....

11. Construction will begin on proposed works on or before ....., 19..

12. The time required for the completion of the works is ..... year.. from ....., 19...

Signed:.....

The State of Wyoming,
County of .....,—ss.

I hereby certify that the foregoing application was signed in my presence and sworn to before me by ....., this .... day of ....., 19...

.....

.....

.....

.....

NOTE.—The statements in the foregoing application, together with the maps and plans, must comply with the requirements of Chapter 69, Session Laws 1903. No right to use water permanently can accrue until beneficial use has been made under an independent permit and proof thereof duly made. The water-right then becomes appurtenant to the lands irrigated or to the thing to which the water may be beneficially applied.

[Printed blanks can be obtained from the State Engineer.]

The State of Wyoming,
State Engineer's Office,—ss.

This is to certify that I have examined the foregoing application and have returned the same without my approval for the following reasons: .....
.....

Witness my hand this .... day of ....., A. D. 19...

.....,
State Engineer.

The State of Wyoming,
State Engineer's Office,—ss.

This is to certify that I have examined the foregoing application and do hereby grant the same subject to the following limitations and conditions:

.....
.....

Construction of proposed works shall begin within one year from date of approval.

The time for completing the work shall terminate on December 31, 19...

Witness my hand this .... day of ....., A. D. 19...

.....,
State Engineer.

(Indorsed:) No. ..... Application for a Permit to Construct the ..... Reservoir and to Store for a Beneficial Use the Unappropriated Water of the State of Wyoming. Division No. ...., District No. ..... The State of Wyoming, State Engineer's Office,—ss. This instrument was received and filed for record on the .... day of ....., A. D. 19.., at .... o'clock .... M., and duly recorded in Book 3 of Reservoirs, on page ...., State Engineer.

[Printed blanks can be obtained from the State Engineer.]

Ditch Proof of Appropriation of Water.

(In accordance with the provisions of Section 928, Chapter 14, Title 9, Division 1, Revised Statutes of Wyoming, and the regulations of the Board of Control thereunder.)

From ..... Tributary of .....

1. Q. State your name.

A. .....

2. Q. Postoffice address.

A. .....

3. Q. Are you the original applicant for Permit No. .....?

A. .....

4. Q. If not, state the date of your securing an interest therein, and the nature of your interest in the works constructed under such permit.

A. .....

5. Q. For what purpose is water used?

A. .....

6. Q. When did the construction of the ..... ditch (or other distributing works described in said permit) begin?

A. .....

7. Q. When was it completed?

A. .....

8. Q. Give date when water was first beneficially used.

A. .....

9. Q. What are the dimensions of the ditch (or other distributing works) built under said permit?

A. Width on top, ... Width on bottom, ... Depth, ... Grade, ...

10. Q. Give the legal subdivisions of land owned or controlled by you on which water has been used, and if an appropriation of water for irrigation is claimed, give the acreage which

[Printed blanks can be obtained from the State Engineer.]

has been irrigated in each legal subdivision prior to the time of the expiration of your permit.

Twp.	Range	Sec.	NE¼				NW¼				SW¼				SE¼			
			NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼

11. Q. Has the water been used beneficially and land irrigated each year since the expiration of your permit? And during what months is water beneficially used?

A. (a) ..... (b) .....

12. Q. What crops were grown on this land in 19..?

A. .....

13. Q. In what county is the above-described land situated?

A. .....

14. Q. Give amount of your investment in the construction of ditch and laterals.

A. .....

The State of Wyoming,
County of .....,—ss.

I, ..., being first duly sworn, do depose and say that I have read the above and foregoing proof of appropriation of water; that I know the contents thereof; and that the facts therein stated are true.

In witness whereof, I have hereunto set my hand this .... day of ....., A. D. 19...

.....

Subscribed and sworn to before me this .... day of ....., 19...

.....
Superintendent, Water Division No. .....

(Indorsed:) Ditch. Proof of Appropriation Under Permit No. ..... Division No. ...., District No. ..... Date of pri-

[Printed blanks can be obtained from the State Engineer.]

ority, ... Name of stream, ... Tributary of ..... Ditch, ... Name of Claimant, ... Filed with me this .... day of ....., 19... ....., Superintendent. Filed in this office this .... day of ....., 19... ....., Secretary of Board of Control. Fees paid, $.....

Reservoir Permit No. .....

Division No. ....., District No. 3.

Reservoir Proof of Appropriation of Water.

(In accordance with the laws of Wyoming and regulations of the Board of Control.)

From ....., Tributary of .....

1. Q. State your name.
   A. .....
2. Q. Postoffice address.
   A. .....
3. Q. Are you the original applicant for Permit No. .....?
   A. .....
4. Q. State the interest you own in the reservoir, when and how same was secured.
   A. .....
5. Q. For what purpose is the storage water used?
   A. .....
6. Q. Where do you use the storage water?
   A. Secondary Permit No. .....
7. Q. When did the construction of the ..... reservoir begin?
   A. .....
8. Q. When was it completed?
   A. .....
9. Q. Give the year storage water was first beneficially used.
   A. .....
10. Q. Has water been stored each year since the reservoir was completed?
    A. .....

[Printed blanks can be obtained from the State Engineer.]

11. Q. (a) Give location of reservoir. (b) In what county is the reservoir situated?

A. (a) .....

A. (b) .....

12. Q. What are the dimensions of the reservoir?

A. Area, ... Max. depth, ... Mean depth, ...

13. Q. Was the reservoir built according to the terms of the permit?

A. .....

14. Q. State size of wasteway.

A. .....

15. State cost of reservoir.

A. .....

State of Wyoming,
County of.....,—ss.

I, ..., being first duly sworn, do depose and say that I have read the above and foregoing proof of appropriation of water; that I know the contents thereof; and that the facts therein stated are true.

In witness whereof, I have hereunto set my hand this .... day of ....., A. D. 19...

.....

Subscribed and sworn to before me this ....day of ....., 19...

.....
Superintendent, Water Division No. .....

(Indorsed:) Reservoir. Proof of Appropriation. Permit No. ...., Division No. ...., District No. ..... Date of priority, ... Name of stream, ... Tributary of ..... Reservoir, ... Name of claimant, ..., ... P. O. Filed with me this .... day of ....., 19... ...., Superintendent. Filed in this office this .... day of ....., 19... ....., Secretary of Board of Control. Fees paid, $.....

[Printed blanks can be obtained from the State Engineer.]

Permit No. .....

Division No. ....., District No. .....

(Adjudication) Proof of the Appropriation of Water.

(In accordance with the provisions of sections 863 to 865, inclusive, Revised Statutes of Wyoming, 1899.)

From ..... Tributary of .....

State your name .....

1. Q. Postoffice.

A. .....

2. Q. State the means of diversion employed. If through a ditch, state its name.

A. .....

3. Q. Are you the owner of said ditch? If so, state your proportionate interest therein.

A. .....

4. Q. (a) State date of survey. (b) State date of construction. (c) State date of completion.

A. (a) .....

A. (b) .....

A. (c) .....

5. Q. If any enlargements were made, state date when begun, the date when completed, and number of enlargement permit.

A. .....

6. Q. State dimensions of ditch as originally constructed and as enlarged.

A. Width—(Top) ..... (Bottom) ..... Depth..... Grade..... Width—(Top)..... (Bottom)..... Depth ..... Grade.....

7. Q. State name or names of persons, association or corporation that built the ditch or canal and the name or names of present owners.

A. .....

8. Q. State the nature of your title to the land for which an appropriation is claimed, and if not owned by you, give the name of the owner and the nature of the possessory right you exercise.

A. .....

[Printed blanks can be obtained from the State Engineer.]

9. Q. State the year when water was first used for irrigation or other beneficial purposes.

A. .....

10. Q. By whom?

A. .....

11. Q. State the number of acres irrigated each subsequent year up to the present time and give the legal subdivisions on which water was used, and, as near as may be, the acreage irrigated in each forty-acre subdivision.

A. Total acreage .....

AREA IN ACRES.

Twp.	Range	Sec.	NE 1-4				NW 1-4				SW 1-4				SE 1-4			
			NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼

12. Q. State the character of the soil and the kind of crops cultivated.

A. .....

13. Q. The plat prepared by the State Engineer is hereby accepted as showing correctly the location of the ..... Ditch and the land which can be irrigated therefrom. [In case there is objection to the official plat the parties objecting must, when giving proof, file a written statement of the reasons therefor, and must within thirty days file with the Division Superintendent a map of said ditch and irrigated lands, with affidavit of surveyor attached thereto giving date of survey.]

A. .....

14. Q. When does your irrigation season begin and when does it end?

A. .....

15. Q. If water is used for other purposes than irrigation, state the nature of such use, the time when such use began, and how much water is required for such purpose.

A. .....

16. Q. During what months is the water used?

A. .....

17. Q. Have you had sufficient water each year since the use for which an appropriation is claimed began? If not, state the

[Printed blanks can be obtained from the State Engineer.]

years of scarcity, the months when the supply was insufficient, and the reason of such scarcity.

A. .....

State of Wyoming,
County of.....,—ss.

I, ..., being first duly sworn, do depose and say that I have read the above and foregoing proof of appropriation of water; that I know the contents thereof; and that the facts therein stated are true.

In witness whereof, I have hereunto set my hand this .... day of ....., A. D. 19...

.....

Subscribed and sworn to before me this .... day of ....., A. D. 19...

.....
Superintendent, Water Division No. .....

Remarks: .....
.....

(Indorsed:) Adjudication. Proof of Appropriation. Permit No. ..... Division No. ...., District No. ..... Date of priority, ... Name of stream, ... Tributary of ..... Ditch ..... Name of claimant, ..., ... P. O. Filed with me this .... day of ....., 19... ...., Superintendent. Filed in this office this .... day of ....., 19... ....., Secretary Board of Control. Fees paid, $.....

Certificate of Appropriation of Water.

Certificate Record No. ....., Page .....

WHEREAS, ... has presented to the Board of Control of the State of Wyoming proof of the appropriation of water from ....., tributary of ....., through the ..... Ditch under Permit No. ....., for irrigation of the lands herein described, lying and being in ..... County, Wyoming,

[Printed blanks can be obtained from the State Engineer.]

NOW KNOW YE, that the Board of Control, under the provisions of Division 1, Title 9, Chapters 10 and 14 of the Revised Statutes of Wyoming, 1899, has, by an order duly made and entered on the .... day of ....., A. D. 19.., in Order Record No. ....., page ....., determined and established the priority and amount of such appropriation as follows:

Name of Appropriator, ... Postoffice address, ..., Wyoming. Amount of Appropriation, ... cu. ft. per sec. Date of Appropriation, ... Description of land to be irrigated and for which this appropriation is determined and established. Total Acreage, ...

.....

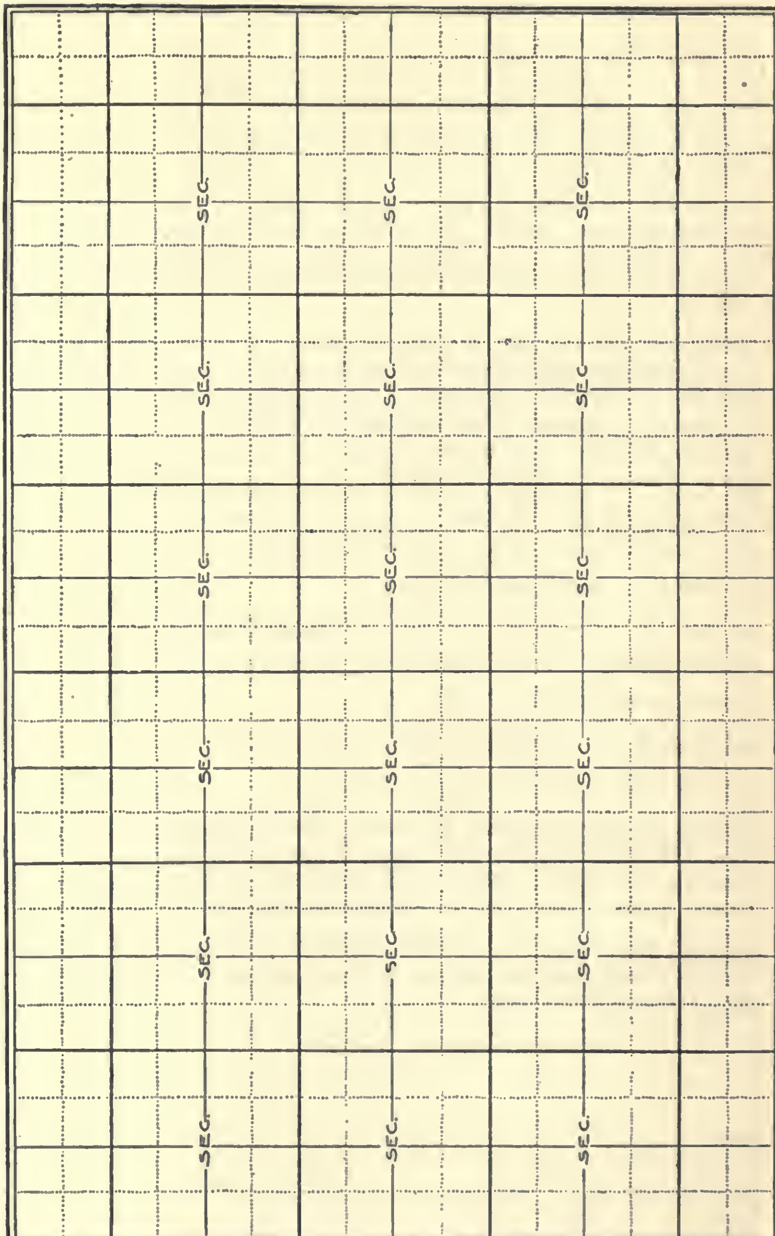
.....

The right to water hereby confirmed and established is limited to irrigation ....., and the use is restricted to the place where acquired and to the purpose for which acquired; rights for irrigation not to exceed one cubic foot per second for each seventy acres of land for which appropriation is herein determined and established.

In testimony whereof, I, ..., President of the State Board of Control, have hereunto set my hand this .... day of ....., A. D. 19.., and caused the seal of said Board to be hereunto affixed.

....., President.

Attest: ....., Secretary.



Township ...., Range ...., of the ...... P. M., ...County,........ State.

The general law of appropriation of water will be found discussed in the following books:

YALE ON MINING CLAIMS AND WATER RIGHTS (1867). Best for the history of the subject, and its discussion of the early California cases.

BLANCHARD AND WEEKS ON MINING CLAIMS AND WATER RIGHTS (1877).

POMEROY ON RIPARIAN RIGHTS (1887). Written by Professor Pomeroy to stay the encroachment of the law of prior appropriation upon the common law of riparian rights, and to vindicate what is now called the California doctrine—a recognition of both systems. An edition by H. C. Black is referred to as Black's Pomeroy. In the present book, references are to the original edition of 1887.

LINDLEY ON MINES. For the general public land law, and for the principles governing pollution of waters by mining.

KINNEY ON IRRIGATION (1894).

WORKS ON IRRIGATION (1900). Contains a discussion of the law of canal companies as public service corporations.

LONG ON IRRIGATION (1901).

FARNHAM ON WATERS (1904).

MILLS' IRRIGATION MANUAL (1907).

ARTICLE "IRRIGATION," in 17 American and English Encyclopedia of Law, 485, by the author of "Long on Irrigation." The writer is informed that the article upon "Waters and Watercourses" in the Encyclopedia of Law and Procedure ("Cyc.") is being written by Mr. H. C. Black.

NOTES TO AMERICAN STATE REPORTS AND LAWYERS' REPORTS ANNOTATED, especially 43 Am. Dec. 269, 60 Am. St. Rep. 799, 93 Am. St. Rep. 711, 30 L. R. A. 665.

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